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No. ——

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Fourteenth Amendment and the Commerce Clause permit a state to impose $50,000,000 as punitive damages on an interstate railroad for lawful personnel reductions in other states?

LIST OF PARTIES

Petitioner and respondent were the only parties in the courts below. Petitioner sued as surviving spouse of Paul Joseph Palank and as personal representative of his estate, and as mother, natural guardian and next friend of Taylor Rose Palank and Josef Paul Palank.

LIST PURSUANT TO RULE 29.6

Petitioner is wholly owned by CSX Corporation, whose stock is publicly traded. No publicly held company owns 10% or more of CSX's stock.

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ANGELICA ROSE PALANK,

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Petition for a Writ of Certiorari to the District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Florida District Court of Appeal, Fourth District, entered in this case on August 25, 1999.

OPINIONS BELOW

The opinion of the District Court of Appeal is reported at 743 So. 2d 556 and is reproduced in the Appendix at A. 3a. The order of that court denying rehearing and certification is unreported and is reproduced at A. 17a. The order of the Supreme Court of Florida denying review is unreported and is reproduced at A. 1a. The opinion of the Florida Circuit Court for the 17th Judicial Circuit is at A. 19a.

JURISDICTION

The judgment of the Florida District Court of Appeal was entered August 25, 1999, A. 3a, and its order denying rehearing and certification was entered November 5, 1999, A. 17a. A timely petition for review by the Supreme Court of Florida was denied March 15, 2000. A. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, and the Commerce Clause, Article I, § 8, cl. 3, are reproduced at A. 39a.

STATEMENT

Respondent's decedent was a passenger killed when an Amtrak train derailed at Lugoff, South Carolina on July 31, 1991. The train was operated on petitioner's tracks. Respondent alleged that the derailment had been caused by a defective switch which had not been properly inspected and repaired.

Respondent as widow and personal representative brought suit in the Circuit Court for Broward County, Florida on behalf of the estate and survivors. Petitioner did not contest liability for compensatory damages, which a jury awarded in the amount of $6,140,000, and the Florida District Court of Appeal affirmed. 697 So. 2d 858 (Fla. App. 1997) (mem.).

A. *The Trial.*

Trial was then held before a second jury to determine whether petitioner should also be held liable for punitive damages and, if so, the amount. The fact that over a ten-year period petitioner and its five predecessor railroads had reduced the number of maintenance-of-way employees throughout its multi-state system became the focus of respon-

dent's claim for punitive damages. Respondent was allowed over objection to introduce evidence of reductions in maintenance-of-way personnel that had occurred from 1981 to 1993 throughout petitioner's multi-state system, following a series of mergers by several railroads that ultimately formed petitioner CSXT in 1986.[1] Respondent over objection presented evidence that such personnel reductions resulted in cost savings of $2.4 billion over ten years. Blaming downsizing for the accident, respondent's counsel emphatically and repeatedly urged the jury that the jury should punish petitioner for these employment reductions. For example:

> "There is a tremendous profit in cutting back on maintenance of way personnel, even if things go wrong, because of the amount of money that can be saved because the numbers are so great.
>
> "That will continue to happen with CSXT and with all other railroads unless somebody stops it."

Tr. 13447.

> "As you know from phase one, of course, the enhancement of profits from the cutback of maintenance of way personnel from 1981 up through 1993 is 2.4 billion dollars and change, I think 2.406 billion dollars."

Tr. 13853-54.

> "[W]e have seen that not counting the fringe benefits from 1981 to 1993 and 1997 dollars, that there has been a savings or an enhancement of profit of 2,406,000,000 —$2,406,000,203 from 1981 through 1993."

Tr. 13962.

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[1] Petitioner presented evidence that the system-wide reductions resulted from mechanization and technological advancements that improved efficiency and worker productivity. Tr. 10001, 10010-12, 10636-37, 10760.

"We've got the ill gotten gain of 2.4 billion dollars."

Tr. 13967.

> "The savings that they got by cutting maintenance of way forces is substantial. The costs of the derailments and whatever expenses they have by having a train derail are relatively small compared to the 2.4 billion dollars savings. And so what a verdict like this does is balance it, is balance the equation."

Tr. 13983.

Citing *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), petitioner requested that the jury be instructed: "You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida." CX 15, no. 9. However, the court refused to give such an instruction.[2]

The jury then awarded punitive damages of $50,000,000. In post-trial motions petitioner again argued that "[t]he jury should have been instructed . . . that the jury should not award money to deter future conduct, whether lawful or unlawful, outside its borders," and that such an instruction was "consistent with the dictates of *Gore* . . . and necessary given the evidence and plaintiffs' arguments to the jury." Memorandum Supporting Motions for Judgment Notwithstanding the Verdict, Remittitur and New Trial, Cir. Ct., at 44. Petitioner urged that under those cases "[p]ersonnel cutbacks by CSXT and its predecessors over an entire decade in states up and

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[2] Instead, the jury was instructed to consider, *inter alia*, "the nature, extent and degree of misconduct and the related circumstances" and "any other circumstances which may affect the outcome of punitive damages." Tr. 14068.

down the Eastern seaboard went far beyond Florida's legitimate interests in this case." *Id.* at 30.

However, the trial court denied petitioner's post-trial motions and entered judgment for the full amount of $50 million punitive damages plus costs. A. 19a.

B. *The Appeal.*

Petitioner appealed to the Florida District Court of Appeal, challenging the punitive award on the grounds, *inter alia*, that it was excessive under both state and federal law, and also that by punishing lawful conduct occurring in other states, the punitive award violated the Fourteenth Amendment and the Commerce Clause.[3] Again citing this Court's decision in *BMW of North America, Inc.* v. *Gore*, petitioner urged that "there was no evidence that there was anything remotely unlawful about the manpower reductions made by railroads across the Eastern seaboard throughout the 1980's" and that "constitutional restraints prohibit one state from imposing punitive damages in order to deter a defendant from engaging in lawful conduct in other states." Initial Brief of Appellant, Fla. Dist. Ct. App., at 33. Petitioner contended, as it had in the trial court, that "[t]he jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585." *Id.* at 43 n.39.

The Court of Appeal affirmed, citing its decision issued four months earlier in *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603 (Fla. App. 1998), *approved*, 749 So. 2d 483 (Fla. 1999). A. 12a. In that case, rejecting a

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[3] Petitioner also argued that the punitive award violated Fla. Stat. § 768.73 (1995), which at that time provided that punitive damages exceeding more than three times compensatory were presumed excessive unless demonstrated otherwise by clear and convincing evidence.

Tenth Circuit decision, the Florida court adopted the following position:

> "II. *Punishing Conduct Occurring Outside the State of Florida*
>
> "Owens-Corning next argues that the imposition of punitive damages should have been barred in this case under the Due Process Clause of the Fourteenth Amendment since the conduct of which Ballard complained was wholly unrelated to the State of Florida. In this regard, it cites to *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).
>
> * * *
>
> "Only one federal case since *BMW* has addressed this question. In *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241, 117 S.Ct. 1846, 137 L.Ed.2d 1049 (1997), which involved tort claims for interference with contracts and prospective business advantage, the Tenth Circuit noted that, unlike in *BMW*, the defendant's conduct below would be tortious in any state. Still, the court held that, 'we read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states.' *Id.* at 637.
>
> "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive. The opinion ignores that, in *BMW*, the record specifically reflected that Alabama was seeking to impose the punitive damages award as a stance against BMW's nationwide policy. Since the policy was not considered tortious in several other states, the Court found that the effect of the award would be to sanction lawful behavior. In contrast, where the defendant's conduct is considered tortious in all 50 states, as here, the same due process concerns implicated in *BMW* do not arise."

739 So. 2d at 606. The Court of Appeal accordingly approved the admission of "evidence showing that CSX and its predecessors engaged in cutbacks of maintenance of way employees from 1981 through 1993, and that these cutbacks resulted in savings of approximately $2.4 billion for the company," even though "the evidence introduced was not limited to cutbacks in the Hamlet Division, where the derailment occurred." A. 7a-8a. The court held that "Evidence of corporate downsizing for profits was relevant to show a motive for CSX continuing such conduct." A. 8a.

Petitioner filed a timely petition for rehearing, and also moved to certify the case to the Supreme Court of Florida as one raising questions "of great public importance," see Fla. R. App. P., Rule 9.030(a)(2)(A)(v), including whether the trial court had violated the constitutional ruling of this Court in *BMW* by permitting the jury to consider evidence of petitioner's reductions in staffing in other states, and also by refusing the instruction "that punitive damages should not be awarded to deter lawful conduct outside Florida's borders," and imposing "liability for punitive damages through evidence attacking corporate down-sizing conduct taken by CSXT and its predecessor railroads all along the Eastern Seaboard." Appellant's Motion for Certification, Dist. Ct. App., 7; see *id.* at 7-8. The motion to certify was denied. A. 17a. The Supreme Court of Florida denied review. A. 1a.[4]

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[4] Discretionary review of issues within its jurisdiction was sought from the Florida Supreme Court, which under Florida law has jurisdiction to review, *inter alia*, express constructions by the District Court of Appeal of constitutional provisions, or certified questions. Fla. R. App. P., Rule 9.030(a); Fla Const., art. V, § 3(b)(3).

REASONS FOR GRANTING THE WRIT

Florida here has continued in its major departure from this Court's admonition that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996)(footnote omitted). This Court emphasized that "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." 517 U.S. at 572 n.17. "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." *Id.* at 573. Yet in this case petitioner was punished, to the staggering sum of $50 million, for lawful personnel reductions that occurred in a system-wide area of more then twenty states. Florida by massive punishment seeks to displace Congress and regulate the system-wide personnel policies of a major instrumentality of interstate commerce.

Although the Tenth Circuit in *Continental Trend* concluded that *BMW* prevents such extraterritorial punitive action, the same Florida panel that decided this case explained that "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive." *Owens-Corning*, 739 So. 2d at 606. As the dissenting Florida Supreme Court Justice protested in that case, "I find this State through its judicial branch has absolutely no constitutional authority or jurisdiction to impose the penalty of punitive damages for the benefit of a nonresident of Florida [in that case] for a defendant's conduct that occurred outside this state." 749 So. 2d at 490 (Overton, J., dissenting). Nevertheless, Florida here has continued on that course.

I. THIS EXTRATERRITORIAL PUNISHMENT VIOLATES THIS COURT'S DECISION IN *BMW* v. *GORE*.

In *BMW* this Court noted with approval that "[t]he Alabama Supreme Court . . . properly eschewed reliance on

BMW's out-of-state conduct." 517 U.S. at 573. Florida, however, has taken exactly the opposite course. In conflict with other states and with federal courts applying *BMW*, here once again it has permitted punitive damages, in a gigantic amount, to punish conduct occurring in other states. Florida's departure from the jurisdictional limits which this Court has held the Fourteenth Amendment and Commerce Clause require calls for review and reversal by this Court.

A. *Violation of the Fourteenth Amendment.*

Under this Court's decisions applying the Fourteenth Amendment's Due Process Clause, Florida cannot require an interstate railroad to alter its nationwide personnel policy, or punish it for not having done so earlier. The decisions of this Court have applied that constitutional principle in many contexts, and punitive damages should not be an exception. *E.g.*, *Allied-Signal, Inc.* v. *Director*, 504 U.S. 768, 777 (1992)(state tax); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989)("The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State"); *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80 (1938)(state tax); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 410 (1930)(contracts outside the state); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881)("No State can legislate except with reference to its own jurisdiction"). "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975); see also *New York Life Ins. Co.* v. *Head*, 234 U.S. 149 (1914)(state may not regulate terms of extraterritorial contracts).[5]

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[5] This is distinct from the separate due process violation occurring if interstate companies are subjected to multiple punishments by several states for the same conduct. *Cf. Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

That the state labels its extraterritorial regulation as "punitive damages" does not alter the constitutional violation. "The name given by the State to the imposition is not conclusive." *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 348 (1922). And even if Florida could, in some carefully tailored way, regulate railroad staffing policy in a manner confined within its borders, the Constitution certainly does not permit it without any allocation to do so outside them. See, *e.g.*, *Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 120 S. Ct. 1022, 1028 (2000):

> "Because California's offset provision is not a reasonable allocation of expense deductions to the income that the expense generates, it constitutes impermissible taxation of income outside its jurisdictional reach. The provision therefore violates the Due Process and Commerce Clauses of the Constitution."

It is apparent also that extraterritorial punishment leads to especially enormous verdicts. Last year's *Owens-Corning* decision, which the Florida court here relied upon and which essentially construed the *BMW* extraterritoriality prohibition out of existence, was at $31,000,000 the largest punitive-damage award upheld in Florida up to that time. But that record did not hold for long; the $50 million upheld by the Florida court here quickly topped it, by $19 million.

B. *Violation of the Commerce Clause.*

The due process limitations on state extraterritorial punishment are of course reinforced by the Commerce Clause. It would be difficult to conceive a clearer example of improper state interference with interstate commerce than Florida's using gigantic punitive awards to regulate the personnel decisions of an interstate railroad operating throughout the eastern United States. Indeed, some of the staff reductions punished here were implemented years previously, not by petitioner, which did not come into existence until 1986, but by prede-

cessor railroads that never operated in Florida or South Carolina at all.

This Court has held on many occasions in many contexts that the Commerce Clause as well as the Due Process Clause prohibit states from imposing regulations on interstate commerce. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 194-95 (1994)(state regulation of milk prices affecting other states); *Allied-Signal, Inc.* v. *Director*, *supra* (state tax); *Healy* v. *Beer Inst.*, *supra* (extraterritorial beer-price controls); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 644 (1982)(state regulation of tender offers); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935)(state regulation of milk prices); *Fargo* v. *Hart*, 193 U.S. 490, 502 (1904)(state franchise tax). And of course "regulation can be as effectively exerted through an award of damages as through [other relief]." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *cf. Geier* v. *American Honda Motor Co.*, 68 U.S.L. WEEK 4425 (U.S. May 22, 2000) (state tort liability invalid because of conflict with federal regulation).

In particular, state attempts to enforce their policies on interstate railroads have regularly been invalidated by this Court. See, *e.g.*, *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945)(length of trains)("[t]he practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it"); *Norfolk & W. Ry.* v. *Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968)(state may not tax railroad rolling stock outside its borders); *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)(state may not "project the taxing power of the state plainly beyond its borders"); *Southern Ry.* v. *Kentucky*, 274 U.S. 76 (1927)(excessive franchise tax on interstate railroad); *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920)(railroad is "an organic system of wide extent" and Commerce Clause prevents "expos[ing] the heel of the system to a mortal dart"); *The Delaware Railroad Tax*, 18 Wall. 206, 229 (1874).

II. THE DECISION CONFLICTS WITH THE APPLICATION OF *BMW* v. *GORE* IN FEDERAL AND STATE CASES.

As the Florida court acknowledged in its *Owens-Corning* decision, Florida's interpretation of *BMW*'s extraterritoriality prohibition contradicts the understanding of that case by the Tenth Circuit. In *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), the Tenth Circuit, after remand by this Court for reconsideration in light of *BMW*, concluded that "the punitive damages award must relate to conduct occurring within the state." 101 F.3d at 636. It further explained that, even if conduct in another state were tortious, *BMW* further "prohibit[s] reliance upon inhibiting unlawful conduct in other states;" therefore a jury should be restricted by instruction to considering only the state's interest in protecting its own citizens and economy. *Id.* at 637; see also *id.* ("[t]he total number of contracts, some of which might have been in other states, could have influenced the amount of the punitive award, as the jury instruction did not limit the jury's consideration to Oklahoma activities"). Nevertheless, the Florida court announced that "We do not find *Continental*'s interpretation of *BMW* helpful or persuasive." *Owens-Corning*, 739 So. 2d at 606.

Also in conflict with Florida's rule is that of Indiana. In *Ford Motor Co.* v. *Ammerman*, 705 N.E.2d 539 (Ind. App. 1999), *cert. denied*, 120 S. Ct. 1424 (2000), the Indiana court held:

> "[T]he record is clear that in closing arguments before the jury . . . . counsel invited the jury to return an award of punitive damages based on alternatives that would punish Ford for conduct occurring beyond the borders of this State. The jury complied. *Gore* prohibits extraterritorial sanctions and as such the trial court properly

> determined that the jury's punitive damages award unwittingly offended the U.S. Constitution."

705 N.E.2d at 561 (footnote omitted). The court added that "We assume that no jurisdiction condones the sale of defective products. Nonetheless it is up to each jurisdiction to make that determination for itself." *Id. Cf.* also *Oliveira* v. *Amoco Oil Co.*, 726 N.E.2d 51, 61-62 (Ill. App. 2000)("Illinois may not impose sanctions on violators of its law with the intent of changing the violator's conduct in other states if it was lawful where it occurred and had no impact on Illinois or its residents") (citing *BMW*). That respondent's decedent was a Florida resident does not permit Florida to extend its power to regulate and punish beyond its borders.

Florida here has again committed exactly the constitutional violation that the Tenth Circuit and Indiana eschewed. Respondent's counsel focused the jury—indeed, incessantly hammered the jury—to base punitive damages on the amount the railroad and its predecessors had saved from personnel reductions throughout the multi-state system over a twelve-year period. That, respondent's counsel repeatedly urged the jury, was what should be punished. See pp. 3-4, *supra*. And, because the court refused an appropriate restrictive instruction, that multi-state, lawful extraterritorial conduct was what the jury was allowed to punish.

Moreover, the personnel reductions which the jury punished were not unlawful, and for that reason also were protected from punishment by the Due Process Clause. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19, quoting *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). It is no answer to say, as the Florida court did in *Owens-Corning*, that negligence is tortious wherever it occurs. The jurisdictional limitations on a state's power to punish for conduct outside its borders apply whether the conduct was tortious or not, as the Tenth Circuit

recognized in *Continental Trend*. Punitive damages are akin to criminal punishment, see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 281 (1994); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991), and states may not extend their criminal jurisdiction beyond constitutional limits. *Nielsen* v. *Oregon*, 212 U.S. 315, 321 (1909).[6] As the Indiana court recognized in *Ford*, "*Gore* prohibits extra-territorial sanctions." 705 N.E.2d at 561.

III. FLORIDA JURIES MAY NOT SET NATIONAL RAILROAD POLICY.

Petitioner has been punished by a Florida jury and court, to the tune of $50 million, for staff reductions and consolidations carried out by itself and several predecessor railroads that merged to form CSXT—a restructuring and downsizing that were designed to rationalize and try to bring more efficiency to a portion of this country's interstate rail transportation industry. Those personnel reductions from technological modernization were exactly the kind of efficiencies, leading to transportation cost reductions and improved profitability and viability of the interstate rail system, that Congress contemplated when it enacted railroad deregulation legislation in 1980. See Staggers Rail Act of 1980, 94 Stat. 1895, 1896-98 (1980), §§ 2, 3, codified in part at 49 U.S.C. § 10101a; see also *id.*, § 101(a), 94 Stat. 1898, 49 U.S.C.

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[6] Nor would there be any basis simply to assume that statutory or even common-law rules for tort liability are identical in all states. *Cf. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir.)(if one assumed all state negligence law were the same, "one wonders what the Supreme Court thought it was doing in the *Erie* case"), *cert. denied sub nom. Grady* v. *Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995). In particular, state rules for whether, how, and by what standards punitive damages may be awarded vary enormously. See generally R. BLATT, *et al.*, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 7.01 (1991).

§ 10101a(9)(federal policy "to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle").[7] *Cf Geier v. American Honda Motor Co., supra; Norfolk S. Ry. v. Shanklin,* 120 S. Ct. 1467 (2000). Those personnel reductions were not tortious; they violated no state or federal law; they violated no federal regulation of interstate rail carriers; and they were implemented in many states outside Florida. For Florida, based upon a jury's notion of appropriate national railroad policy, now to punish this railroad for lawful conduct, cannot be reconciled with this Court's holding in *BMW.*[8]

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

JOHN G. KESTER *
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June 9, 2000

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[7] See also H.R. Conf. Rep. No. 96-1430 (1980) at 79 ("The industry's failure to achieve increased earnings will result in either further deterioration of the rail system or the need for additional Federal subsidy").

[8] See also *United States* v. *Morrison*, 68 U.S.L. WEEK 4351, 4354 (U.S. May 15, 2000)(power to regulate the instrumentalities of interstate commerce is assigned to Congress); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 574 (1997)("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation"), quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

* Counsel of Record

APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA
WEDNESDAY, MARCH 15, 2000

CASE NO.: SC99-29
Lower Tribunal No. : 4D98-3875,
4D97-3798

CSX TRANSPORTATION, INC.
Petitioner(s).

VS.

ANGELICA ROSE PALANK, ETC.
Respondent(s).

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

A True Copy
Test:

/s/ Debbie Causseaux
DEBBIE CAUSSEAUX
Acting Clerk, Supreme Court

kt
Served:

Hon. Marilyn Beuttenmuller, Clerk
Gregg Howard Metzger
Parker D. Thomson
W. Kent Brown
John R. Hargrove
William G. Ballaine
Russell S. Bohn
Christian D. Searcy
Edna L. Caruso
A. J. Melkus
Hon. Arthur Franza, Judge
Hon. Carol Lee Ortman, Acting Clerk

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NOS. 97-3798 & 98-3875

CSX TRANSPORTATION, INC.,
a foreign corporation,
Appellant,

v.

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, deceased; and surviving spouse of PAUL JOSEPH PALANK, deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor,
Appellees.

Opinion filed August 25, 1999.

Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Arthur J. Franza, Judge; L.T. Case No. 92-22407 13.

John R. Hargrove of Heinrich Gordon Hargrove Weihe & James, P.A., Fort Lauderdale, and William G. Ballaine of Landman Corsi Ballaine & Ford P.C., New York, NY, for appellant.

Edna L. Caruso of Caruso, Burlington, Bohn & Compiani, P.A., and Searcy, Denney, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for appellees.

DELL, J.

This action arises out of the derailment of an Amtrak train which was traveling on CSX Transportation, Inc.'s ("CSX") tracks in Lugoff, South Carolina, on July 31, 1991. The decedent, Paul Palank, was a passenger aboard the train. He was the husband of Angelica Palank and the father of two minor children, Josef and Taylor Palank. Angelica Palank, as personal representative of the estate, sued CSX for the wrongful death of Paul Palank, seeking compensatory and punitive damages. CSX did not contest liability on Palank's compensatory damage claims, and this court affirmed the jury's award of $6.14 million in compensatory damages. *See CSX Transport., Inc. v. Palank*, 697 So. 2d 858 (Fla. 4th DCA 1997).

During the punitive damage phase of the trial, the jury determined that CSX was both directly and vicariously liable for the derailment, and awarded Palank $50 million. CSX moved for entry of judgment in accordance with its motion for a directed verdict and alternatively moved for a new trial or remittitur. The trial court denied CSX's motion for a directed verdict, new trial and remittitur, and granted Palank's motion for entry of the $50 million judgment. The trial court also entered a Final Cost Judgment for $294,487.59 in favor of Palank as the prevailing party. CSX appeals the punitive damage award on grounds that the trial court should have granted a directed verdict in favor of CSX, erred in denying CSX's motion for a new trial and erred in denying a remittitur. CSX also appeals the award of costs. We affirm.

CSX argues that the trial court erred in failing to grant a directed verdict in its favor because appellee did not prove that CSX's conduct was the equivalent of criminal manslaughter, as stated in *Jeep Corp. v. Walker*, 528 So. 2d 1203 (Fla. 4th DCA 1988).

In *White Construction Co. v. Dupont*, 455 So. 2d 1026 (Fla. 1984), the supreme court discussed the standard for determining whether a defendant has acted in a manner that would justify the imposition of punitive damages. The court reaffirmed the *Carraway v. Revell*, 116 So. 2d 16 (Fla. 1959), standard:

> The character of negligence necessary to sustain an award of punitive damages must be of a "gross and flagrant character, evincing reckless disregard of human life, or the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."

White, 455 So. 2d at 1029 (quoting *Carraway*, 116 So. 2d at 20 n. 12) (citations omitted). *See also Eastern Airlines. Inc. v. King*, 557 So. 2d 574, 578 (Fla. 1990) (citing *White* as the Florida standard for recovery of punitive damages).

In *Jeep*, this court quoted the holding from *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986):

> Punitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct. They are not intended as a means by which a plaintiff can recover extra damages. Thus, punitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless constitutes a public wrong. Therefore, the question that must be answered utilizing the *Carraway* standard is whether [the defendant] exhibited a *reckless disregard for human life equivalent to man-slaughter....*

Jeep, 528 So. 2d at 1206 (citations omitted). Appellant correctly argues that *Jeep* equates the standard of proof for punitive damages to "a reckless disregard for human life equivalent to manslaughter." However, manslaughter is defined by section 782.07, Florida Statutes (1991), as ". . . the killing of a human being by the act, procurement, or culpable negligence of another. . . ."

> Culpable negligence is defined in the Jury Instructions as:
>
> [M]ore than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life, or for the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

Villafana v. State, 728 So. 2d 260, 260-61 (Fla. 5th DCA 1999). *See* Fla. Std. Jury Instr. (Crim.) at 69. *Chrysler* and *Jeep* therefore, relate the definition of what is required to sustain an award of punitive damages to the standard of culpable negligence, which is essentially the same standard as that used by the Supreme Court of Florida in *Carraway* and *White*. *See also First Healthcare Corp. v. Hamilton*, Case Nos. 98-1992 & 98-2477, 1999 WL _ _ _ _ (Fla. 4th DCA August 18, 1999). Each element set forth for proving culpable negligence is listed in the disjunctive. Likewise, in determining whether a party is liable for punitive damages under *Carraway*, the party seeking such damages can meet the standard by presenting proof of any one or any combination of the enumerated factors.

Here, the record shows the derailment occurred in the Hamlet Division of South Carolina. The cause of the derailment was a defective Orlon switch, the defect being a broken crosspin that had been broken for at least seven months prior to the derailment. The Orlon switch had been installed backwards ten years earlier, and part of the broken crosspin was buried under several inches of graphite ballast placed between the ties more than seven months prior to the derailment. The evidence further shows that a proper inspection would have revealed the broken crosspin. In addition, there is evidence that CSX had actual knowledge that the crosspin was defective because the record shows that CSX periodically greased a plate installed on the switch with graphite to make the switch operate.

The record contains evidence that, as early as 1987, the Federal Railroad Administration ("FRA") performed an extensive audit, more fully addressed hereafter, that revealed deficiencies in CSX's staffing and inspection practices. This evidence shows actual knowledge on the part of CSX as to what would constitute proper staffing and inspections. The record also contains evidence that CSX, for a period in excess of ten years before the derailment, began a systematic reduction in its maintenance of way employees (personnel who would have performed inspections and repairs), the resulting benefit to CSX amounting to approximately $2.4 billion. Additionally, CSX filed false safety inspection reports with the FRA stating that proper inspections were performed when they were not. The evidence presented is sufficient to support a jury finding that CSX's actions and conduct meets the standards set forth in *Carraway, White* and *Jeep* for an award of punitive damages.

Next, CSX argues that the trial court erred in denying its motion for a new trial. We will address only five of CSX's arguments with respect to this issue.

First, during the punitive damage liability phase of the trial, appellee presented evidence showing that CSX and its

predecessors engaged in cutbacks of maintenance of way employees from 1981 through 1993, and that these cutbacks resulted in savings of approximately $2.4 billion for the company. CSX contends that the trial court erred in admitting this evidence because it brought information regarding CSX's wealth before the jury during the liability phase and the evidence introduced was not limited to cutbacks in the Hamlet Division, where the derailment occurred. Evidence of corporate downsizing for profits was relevant to show a motive for CSX continuing such conduct. The evidence of downsizing and the testimony that the limited number of CSX inspectors could not conduct proper inspections of the lengths of track and switches to which they were assigned supports a jury finding of a conscious disregard for the safety of the public. The testimony that the apprentice foreman's supervisor directed him to file false inspection reports with the FRA also supports appellee's argument that CSX knowingly endangered public safety.

Second, CSX contends that the admission of Mrs. Palank's testimony regarding the loss of her husband during the trial on liability for punitive damages was prejudicial and amounted to error. Appellees correctly argue that ordinarily the same jury would hear evidence on both compensatory and punitive damages, and that the admission of this evidence was necessary for the jury to understand the nature of the underlying claim. *See W.R. Grace & Co. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994). We agree and hold that the trial court did not abuse its discretion in allowing the jury to hear the limited evidence concerning the underlying compensatory damage claim.

Third, CSX contends that the trial court erred in allowing evidence of a 1987 FRA audit of the Baltimore Division of CSX's tracks because the audit related to a different division and occurred four years before the derailment.

Following a series of train accidents, the FRA conducted a safety audit of CSX's Baltimore Division, which consists of

approximately 5,000 miles of track across six states and the District of Columbia. The Baltimore Audit was based on interviews with numerous CSX officers and employees, a review of over 7,000 test records, inspections of trains, freight cars, tracks, signals, switches, inspection devices and turnouts. Although the audit indicated that the mainline track was in excellent condition, it stated that there were numerous defective conditions on the turnouts which should have been discovered and reported by CSX's inspectors. The report emphasized FRA inspectors' concerns regarding the inadequate training and number of maintenance of way employees, which they concluded threatened CSX's capacity to maintain the track over the long term.

The report stated: "In general, it is FRA's belief that: . . . The poor quality of track maintenance and repairs has led FRA to conclude that both line employees and supervisors in the Maintenance of Way Department are inadequately trained in both FRA and CSX maintenance standards." The report also stated that many inspectors were scheduled for five full days of inspecting, with no time allowances for duties such as making repairs, and the FRA suspected that some of CSX's inspectors were not able to cover their territories at the required frequencies. The report concluded:

> [M]any track foremen are not actually knowledgeable enough to perform maintenance tasks properly. A suspicion also arises as to the level of expertise of some members of supervision, especially in identifying poor quality work and having it corrected. These two conclusions result in the FRA being concerned over the training and qualifications of these individuals. Although the company has a formal set of maintenance standards, augmented by engineering bulletins, the FRA's observations in the field were that training is spotty and incomplete.

The report also stated:

> Of all the areas [illegible] developed during the safety audit, this one regarding the training, qualifications and abilities of the M[aintenace] of W[ay] people concerns the FRA the most. It is not possible to place enough emphasis on this and the deleterious effects it has been having on the physical plant of CSX.

The FRA also stated its concerns that the quality of track inspections was not acceptable because the records did not accurately reflect the conditions existing in the field and defective conditions were not being found or reported and that track inspection territories were too large to be covered at the required frequencies in an effective manner. The audit concluded that the major problem "lies in the shortage of quality inspectors, which in turn translates into overly large inspection districts and hurried cursory inspections."

Even though the deficiencies addressed in the audit were related to a separate division, the deficiencies were strikingly similar to those in the Hamlet Division. The evidence regarding the audit showed prior knowledge of dangerous similar conditions within the system. *See Lawrence v. Florida East Coast Ry. Co.*, 346 So. 2d 1012, 1015 (Fla. 1977); *Rodriguez v. Loxahatchee Groves Water Control Mgmt. Dist.*, 636 So. 2d 1348, 1350 (Fla. 4th DCA), *rev. denied*, 649 So. 2d 233 (Fla. 1994). Further, the FRA's general observations regarding the poor quality of track maintenance and repairs, as well as the lack of proper training and inspection practices of employees, provided CSX with ample notice of what was needed to provide proper training procedures and inspection practices. The audit, when considered in conjunction with the testimony concerning the inspection practices in the Hamlet Division, was relevant to demonstrate that CSX had actual prior notice that its practices in the Hamlet Division did not meet the FRA standards.

Fourth, CSX contends that the video deposition testimony of Allen Clamp was irrelevant and should not have been admitted because Mr. Clamp last worked for CSX five years before the derailment. Mr. Clamp testified that he worked as a track man for CSX's predecessor and then CSX; Mr. Clamp later worked as an apprentice foreman from 1983 to 1986 for Buster Bowers, the roadmaster who was responsible, in July of 1991, for inspection of the section of track where the derailment occurred.

Mr. Clamp testified that from what he was taught regarding track inspections and safety, it should have been obvious to CSX that there were too few men to perform the required safety inspections and maintenance. Mr. Clamp also stated that while he was working with Mr. Bowers, Mr. Bowers never performed a dissassembly inspection, never walked a switch and conducted no inspection or inadequate inspections by covering too much track too quickly. Mr. Clamp testified that Mr. Bowers directed him to fill out false inspection reports. His testimony shows that conditions similar to those in the Baltimore Division also existed in the Hamlet Division.

Mr. Clamp's successor, Robert Griffith, corroborated his testimony concerning the filing of fraudulent FRA reports regarding track and switch inspections. Although Mr. Clamp left CSX before the derailment, his testimony, along with that of Mr. Griffith, was relevant to show the course of conduct concerning the filing of false inspection reports to the FRA over the course of several years, including the time of the derailment.

Fifth, CSX contends that the trial court erred in allowing the jury to hear evidence regarding CSX's profits and its $5 billion net worth during the final stage of the trial. CSX argues that this evidence should not have been presented to the jury because an indemnity agreement existed between CSX and Amtrak, under which Amtrak would pay any punitive damage award.

CSX failed to present, and we have not found, any Florida law establishing the relevancy of an indemnity agreement that provides for the payment of punitive damages by a third party. Liability for punitive damages and the amount thereof is not determined from the assets of a third party nor from an agreement of a third party to pay such damages. In short, the indemnity agreement was not relevant evidence to the issue of the amount of punitive damages.

For the reasons stated above, we hold that CSX has failed to demonstrate that the trial court erred or abused its discretion in denying its motion for a new trial.

CSX also contends that the trial court should have granted a remittitur pursuant to section 768.73, Florida Statutes (1995), because the punitive damage verdict was excessive. Section 768.73 provides that a punitive damage award may not exceed three times the amount awarded for compensatory damages and is presumed excessive "unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact." *See Owens-Corning Fiberglas Corp. v. Ballard,* 23 Fla. L. Weekly D1077 (Fla. 4th DCA April 29, 1998), *rev. granted,* 722 So. 2d 193 (Fla. 1998).

Judge Franza's nineteen page order specifically details his findings in support of the $50 million verdict and the denial of appellant's motion for a remittitur. The order summarizes the testimony and evidence that supports the jury's verdict by clear and convincing evidence, and concludes, in part,

> Here, the clear and convincing evidence shows that upon the presentation of all the testimony and evidence and the conclusion of the trial, CSXT could neither negate nor mitigate the cost of its flagrant violation of the public trust. Keeping with the policy that punitive damages should punish and deter, a jury of six

reasonable persons concluded that $50 million would adequately communicate to this Defendant, that this type of reprehensible conduct should not and would not be tolerated.

The jury was presented with an enormous figure by the Plaintiff. However, this jury decided upon $50 million.[1] Finally, in rendering their $50 million penalty, jurors included a handwritten note [on the verdict form] to express their concern. They wrote, "*It is hoped that CSX trainers will emphasize [the] need to inspect both ends of crosspins.*"

These are not the words of a run away jury. This was a knowing cognoscente jury and their deterrent punishment, sting, if you will, was very reasonable in light of the assets of Defendant which the uncontradicted evidence showed, was over $5 billion.

. . . .

The knowledge that Defendant's conduct bespoke, an intentional disregard for human safety, was loud and clear. Defendant's repetitive and callous indifference eventually matriculated into an entire want of care without any regard or lack of conscience, for the safety and welfare of the public. . . .

This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. This evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid with eight human lives. The clear and

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[1] In closing, appellees asked for between $275 million and $500 million.

convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is orderline criminal.

Here, critical rail personnel were cut away leaving virtually no way for the company to sufficiently ensure the safety of the rails. Despite Defendant's allegations that cutting-back maintenance of way personnel caused no hazard, the clear and convincing evidence does not support this contention.

. . . .

Clearly, Defendant knew of the peril created by its reductions and the company chose to proceed on its own course. The evidence showed that federal rail regulators warned the company and that management turned a deaf ear to those persons, just as it did to the company's own front line rail personnel.

In terms of the actual rail inspections, the clear and convincing evidence showed repeated patterns of carelessness. The company carelessly reported and accepted track inspection reports when it was blatantly obvious that the information was false.

However, most damaging was the cross pin itself. It told an entire story about the policy and manner in which Defendant administered its duty to provide safe rail to the thousands of railway passengers known to rely on the company. The evidence showed that to keep the device working, "standard" repairs often included jumping up and down on the switch and/or applying "grease" to the apparatus.

The clear and convincing evidence showed that for at least 7 1/2 months, the cross pin lay on the ground buried in granite ballast. The FRA, upon examining the

> rail north and south of the Orlon switch, found many defects including another missing cross pin.
>
> . . . .
>
> This Court does not find that the $50 million verdict in the instant matter was influenced by prejudice, passion, or corruption or that the jury misconceived the merits of the case. There is no question in this Court's mind that the jury based its verdict on the evidence presented to it. This Court also finds that the jury did not arrive at the amount of damages by speculation and conjecture. This jury accepted the Plaintiff's testimony and that of her witnesses.

(footnote omitted).

CSX argues that Judge Franza's characterizations that CSX's conduct "showed repeated patterns of carelessness" and "not only bespeaks culpable negligence, it is borderline criminal," contradicted his conclusion that punitive damages were warranted and the amount awarded was sustainable despite the statutory cap. Neither *Carraway* nor *Jeep* requires the conduct to be criminal, which would impose a standard of proof beyond a reasonable doubt, a standard much greater than that required for the recovery of punitive damages.

We hold that the evidence presented supports Judge Franza's conclusion that the jury properly awarded punitive damages. We also hold that the record supports Judge Franza's conclusion that appellees successfully rebutted the presumption of excessiveness of the punitive damage award. *See* § 768.74(5)(a)-(e), Fla. Stat. Further, we reject CSX's argument that the verdict was "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Lassiter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 627 (Fla. 1976).

In summary, we hold that the trial court did not err in denying CSX's motions for a directed verdict, for a new trial or for remittitur. Accordingly, we affirm. We also affirm the trial court's award of costs in favor of appellee as the prevailing party.

AFFIRMED.

POLEN and STEVENSON, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

CASE NO.: 97-3798
97-3875
L.T. No.: 92-22407 13

CSX TRANSPORTATION, INC.
Appellant/Petitioner(s),

v.

ANGELICA ROSE PALANK, ETC.
Appellee/Respondent(s).

November 5, 1999

BY ORDER OF THE COURT:

ORDERED that appellant's motion filed September 9, 1999, for rehearing is hereby denied; further,

ORDERED that appellant's motion filed September 9, 1999, for rehearing en banc is hereby denied; further,

ORDERED that appellant's motion filed September 9, 1999, for certification is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

William G. Ballaine	John R. Hargrove	Russell S. Bohn
A. J. Melkus	Christian Searcy	Daniel J. Fleming
Edna L. Caruso	W. Kent Brown	Todd Stewart
F. Gregory Barnhart		

ch

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

APPENDIX D

IN THE
CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 92-22497(13)

JUDGE: ARTHUR J. FRANZA

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, Deceased, and Surviving Spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor and JOSEF PAUL PALANK, a minor,

Plaintiffs,

v.

CSX TRANSPORTATION, INC., a foreign corporation

Defendant.

ORDER

This cause is now before this Court upon Plaintiff, Angelica Palank's Motion for Entry of Judgment, as well as Defendant, CSX Transportation, Inc.'s (hereinafter CSXT), Motion for Remittitur, Motion to Set Aside Verdicts and For Entry of Judgment In Accordance With Its Motion for Directed Verdict, and Motion for New Trial. Having heard the arguments of counsel, considered all briefs and supplements submitted by the parties, and being otherwise fully advised in the premises, this Court hereby finds as follows:

The instant matter arises from a train derailment that occurred in the town of Lugoff, South Carolina on July 31, 1991. Traveling at 79 miles per hour, Amtrak train Silver

Star No. 82 derailed at the Orlon switch on Mile Marker 329.6. After receiving a jury verdict of $6.1 million in compensatory damages, Plaintiff sought punitive damages against Defendant for the death of Paul Palank, her husband.

During the lengthy trial proceedings before this Court, Plaintiff argued that Defendant downsized its maintenance of way manpower, claiming that the company put profits before safety. Plaintiff further maintained that as a result, the company's divisions did not have enough men to inspect and maintain the equipment, let alone carefully inspect equipment pursuant to the rules of the FRA[1] as well as Defendant's own rules of procedure.

Plaintiff contented that with fewer people available to adequately conduct and complete rail inspections within the normal workday, CSXT compromised and seriously undermined the integrity of the inspection process. Furthermore, Plaintiff claimed that more manpower was consistently requested but Defendant failed to satisfy the request and more man power was never added except as gangs to do major projects from time to time.

Plaintiff sought to establish at trial that when Defendant did inspect the rails, inspections did not satisfy federal and corporate safety requirements. Plaintiff attempted to demonstrate through evidence that as part of the inspection process, maintenance personnel were required to ride-over tracks, looking to detect defects and other hazards. Plaintiff presented testimony which alleged that because of the company's inadequate maintenance of way staffing, inspectors conducted the ride-overs at improper rates of speed. Additionally, Plaintiff attempted to show that track inspectors failed to exit ride-over vehicles to conduct close-up inspections in instances where a sufficient inspection of the rail and equipment could not be conducted from afar.

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[1] Federal Railway Administration.

The testimony also attempted to show that because of the severe cutbacks in maintenance of way personnel, Defendant improperly relied upon uncertified crank hands to conduct rail inspections. Plaintiff argued that untrained crank hands accompanied and assisted certified track inspectors on inspections designed to detect potential track problems. Furthermore, Plaintiff sought to demonstrate negligence on the part of Defendant, alleging that some 7½ months before the derailment, the cross pin in the malfunctioning switch, fell from its secured position within the crank. Plaintiff asserted that months of negligently conducted rail inspections failed to detect and repair that hazard.

Plaintiff also agued that during the ten-year period preceding that derailment, key maintenance of way personnel fraudulently claimed that rail inspections had been completed when in fact the inspections were never conducted. In addition, Plaintiff argued that inspection reports were fraudulently engineered by maintenance of way personnel to skew safety reports to falsely reflect that rail track in the Hamlet Subdivision was safer then it actually was. Plaintiff asserted that the company's reports falsely claimed 18 hours of rail inspections, when only 5 and 6 hours could possibly be completed within a normal work day, given the available maintenance of way manpower.

In conclusion, Plaintiff challenged that Defendant, by placing bottom line profits over the safety of railway passengers, negligently breached its duty to maintain safe rail track in the Hamlet Subdivision. Accordingly, Plaintiff argued that Defendant's negligent conduct justifiably warranted punitive sanctioning. Upon the conclusion of the case, Plaintiff urged the jury to award a large penalty that would send a message to Defendant and adequately discourage the company from continuing to operate in the manner as alleged.

Defendant contended that punitive damages were not warranted. The company claimed that its conduct failed to

rise to the level of wrongdoing for which punitive sanctioning may be imposed. Defendant argued that the corporation, long before the derailment of Silver Star No. 82, made the reasonable business decision to mechanize rail operations. This mechanization Defendant argued, served to update the rail system consistent with industry practices.

However, Defendant conceded that mechanization ultimately saved the corporation billions of dollars by eliminating the need to maintain large maintenance of way work forces. Defendant contended that mechanization of the rail system resulted in more efficiency in ensuring rail safety, not hazards.

Defendant presented evidence claiming that with the mechanization, the Hamlet Subdivision enjoyed a ten-year history devoid of cross pin of similar mechanical failure. It was Defendant's contention that the malfunction on the morning of July 31, 1991, resulted from the unexpected and extraordinary failure of the switch and cross pin. Moreover, the company argued that prior inspections showed that the cross pin was in place and functioning properly prior to the derailment.

Defendant's evidence also attempted to show that maintenance of way personnel had sufficient time within which to conduct proper inspections and that proper inspections had been conducted. The company argued that maintenance of way inspectors conducting the inspection, utilized the most care in inspecting and maintaining safe rail track. Defendant further argued that at all times proceeding the tragic derailment, sufficient manpower was maintained, and that Defendant had no knowledge of any dangerous problems posed by the switch. Defendant maintained that rail inspections were conducted on the day before the accident by maintenance of way personnel on the rail track in question.

Upon the presentation of all the evidence and the conclusion of the lengthy trifurcated proceedings the jury

found and pronounced Defendant liable for $50 million in punitive damages.

The instant motions followed. Plaintiff now moves this Court to enter final judgment for the $50 million punitive damages penalty imposed by the jury and Defendant now moves this Court to remit the $50 million award to $18.3 million, three times the $6.1 compensatory damages previously awarded to Plaintiff. Alternatively, Defendant moves this Court to set aside the verdict and have judgment entered in its favor and/or to grant a new trial on the issue of punitive damages.

Citing substantial deficiencies in proof as grounds to modify and or rescind the conclusions reached by the jury and the accompanying penalty, Defendant contends that the $50 million award is contrary to the law and evidence. Furthermore, Defendant contends that remittitur of the $50 million punitive award is required pursuant to Section 768.73(1), Florida Statutes (1995).

Longstanding in our civil jurisprudence is the policy of permitting the harsh sanction of punitive damages to deter and punish egregious conduct. *BMW of North America, Inc. v. Gore,* —— U.S. ——, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996); *S & S Toyota, Inc. v. Kirby,* 649 So. 2d 916 (Fla. 5th DCA 1995). Unlike compensatory damages, this type of award is based in part, on juror emotion, as punitive damages also express society's collective outrage at unacceptable behavior. *American Cyananid Co. v. Roy,* 498 So. 2d. 859, 861 (Fla. 1986). The potentiality of an adverse punitive award suitably correlates the seriousness of this civil punishment to similar criminal laws designed to discourage the reckless disregard of public safety. *Ingram v. Pettit,* 340 So. 2d 922, 925 (Fla. 1976).

The sanctioned offender is deemed to have committed some private injury partaking of public wrong, worthy of an

additional monetary penalty separate from the actual damage compensated. *Chrysler Corp. v. Wolmer,* 499 So. 2d 823 (Fla. 1986); *Ingram,* 340 So. 2d 922 (Fla. 1976). The resulting sanction is then crafted to reflect the enormity of the offense. *Gore,* —— U.S. ——, 116 S. Ct. 1589. 134 L. Ed. 2d. 809 (1996).

However, not all conduct falls within the reach of the punitive sanction rod. Conduct warranting punitive damages must be more then gross negligence. *W.R. Grace & Company v. Waters,* 638 So. 2d. 502 (Fla 1994); *Como Oil Co., Inc. v. O'Loughlin,* 466 So. 2d. 1061 (Fla 1985); *White Construction Company, Inc. v. Dupont,* 455 So. 2d 1026 (Fla. 1984). Willful, wanton misconduct which although not criminal, is equivalent to criminal manslaughter[2] characterizes one standard by which punitive sanctions are permitted. *White* at 1029.

This standard of negligence may be easily likened to the standard of culpable negligence required to sustain a criminal manslaughter charge as both must be: (1) of a gross and flagrant character, evincing reckless disregard of human life of the safety of persons exposed to its dangerous effects; (2) an entire want of care which would raise the presumption of indifference to consequences; and/or (3) such wanton, reckless, or gross careless disregard of the safety and welfare of the public, that the conduct can be considered reckless indifference to the rights of others equivalent to an intentional

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[2] Section 782.07. Florida Statute (1996) defines manslaughter as:

> the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provision of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, punishable as provided in s. 775.082, s. 775.083. or s. 775.084.

violation of those rights. *Hodges v. State,* 661 So. 2d. 107 (Fla. 3d DCA 1995); *see also W.R. Grace,* 638 So. 2d 502 (Fla. 1994).

However, under a criminal standard, the negligence involved amounts to the "conscious doing of an act," i.e the following of a course of conduct which any reasonable person would know would likely result in death or great bodily harm to some other person even though committed without intention to injure. *Marasa v. State,* 394 So. 2d 544 (Fla. 5th DCA 1981).

Furthermore, notwithstanding the obvious difference between criminal and civil burdens of proof, criminal negligence goes an additional step in delineating culpable conduct. It further distinguishes culpability by imposing different, hasher punishments in instances where the culpable conduct results in death than that which only injury results. Where it is determined that death resulted from negligence, a higher penalty is generally imposed since negligence under those circumstances is deemed a felony whereas misdemeanor culpable negligence contemplates personal injury not resulting in death. *Murray v. State,* 328 So. 2d. 501 (Fla. 4th DCA 1976).

Alternatively, the conduct challenged under civil law also requires negligence which clearly evinces a reckless disregard of human life or the safety of persons exposed to its dangerous effects; i.e. (1) a complete lack of care which would raise a presumption of conscious indifference to the consequences, (2) a gross and careless disregard of public safety and welfare, or (3) reckless indifference to the rights of others which is the equivalent to an intentional violation of those rights. *White,* 455 So. 2d. 1026 (Fla. 1985); *S & S Toyota, Inc. v. Kirby,* 649 So. 2d. 916 (Fla. 5th DCA 1995). However, conduct warranting punitive damages does not specifically require that a harsher penalty be im-

posed where the negligent conduct results in death as opposed to injury.[3]

In the case *sub judice*, as a common carrier, Defendant was charged with a duty to exercise the highest degree of care in safely maintaining the rail track. *Edwards v. Jacksonville Coach Co.*, 88 So. 2d. 543 (Fla. 1956); *State v. Tavares & G.R. Co.*, 82 So. 833 (Fla. 1919). The clear and convincing evidence shows that, on the morning of July 31, 1991, traveling passengers relied on Silver Star No. 82 to safely transport them from Miami, Florida to the train's final destination of Washington, D.C. Unfortunately, they did not arrive as CSXT's duty had not been fulfilled.

Here, the clear and convincing evidence shows that the equipment which Defendant asserted as having eliminated the company's need for it's old policy of maintaining large maintenance of way manpower, was 25 to 40 years old. The testimony of Luther E. Bowers, the roadmaster and acting supervisor for the Hamlet Subdivision, revealed that no production gangs had been sent to that territory for some 11 to 12 years preceding the derailment of Silver Star No. 82. (Tr. 5/27 p. 36).

Different, more modern, and better equipment was available to this company in the way of safety precautions. The testimony of Donald E. Turney, the Assistant Vice President of Maintenance of Way, acknowledged that mechanization had no real significant impact upon inspection crews. (Tr. 5/29 p. 42). Yet, the company relied on and continued to use equipment almost a quarter of a century old, if not older, while claiming that the company had modernized operations. Top brass talked safety, but their corporate

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[3] However, in addition to culpable negligence, criminal manslaughter requires proof that the victim is dead and that the killing was not a justified or excusable homicide. *State v. Richards*, 639 So. 2d. 680 (Fla. 2d DCA 1994).

actions did not. Their attitude was fix it with the men you have, no matter what.

The clear and convincing testimony of corporate operating officers who testified at trial was that they acknowledged that all accidents are preventable. Here, the clear and convincing evidence shows that this tragic and unfortunate accident could have and should have never occurred. However, regulators did not regulate this carrier. They are great after the fact, but are needed before. In South Carolina, the FRA had one man for one state. This carrier was left to police itself, but did not.

The clear and convining evidence showed that a 1987 safety audit conducted on another division of track, the Baltimore Audit, should have alerted Defendant that its track and equipment in South Carolina and other places needed the company's immediate attention. Conducted four years before the derailment of Silver Star No. 82, the Baltimore Audit detailed many hazards. Surely that audit should have concerned and alerted CSXT. It did not.

Instead of heeding the red flags sent by federal regulators, Defendant repaired only what they were told to fix in Baltimore and by 1989, were in compliance in Baltimore but still were told they did not have enough men. However, from the obvious dangers exposed in the 1987 audit, CSXT officials should have had the common sense to check its rails throughout this railroad to see if the hazardous conditions were the same in other areas. Failure to do so is clear and convincing evidence that Defendant could have cared less about passenger safety and the obvious happening of a derailment in the future was inevitable if safety is either ignored or relegated to the back burner.

A report issued by the union further confirmed those cries. It was referred to as the "Inclima Report" and concluded that Defendant's manpower was insufficient. Yet, the testimony of Defendant's operating officer was that he never read the

report and had no intention of reading it. Neither Carpenter, a former CSXT president nor Epting or Smith, other CSXT management personnel, had read the report. (Tr. 5/7 p. 127, 150-52; 5/8 p. 38; and 6/26 p. 49).

Corporate eyes that did not look, therefore, did not see. Corporate ears that did not hear, therefore, were deaf to their worker's pleas. The testimony of Jerry R. Davis, a former CEO; Jerry Epting, Chief Engineer of Maintenance of Way; and Randall Smith, an Assistant Division Engineer, revealed that top management never saw the audit or acted on it. (Tr. 5/7 p. 147, 48; 6/26 p. 49; 5/7 p. 130). Furthermore, the testimony of Roadmaster Bowers was that he had asked corporate higher-ups for more men. James Rhoades, a claims adjuster for the area, also testified that common among worker complaints was the cry for additional staff. (Tr. 5/6 p. 149).

The clear and convincing evidence further showed that Defendant failed to adequately conduct inspections of the rails and equipment. Corporate representatives testified that two track inspectors rode the high rail, one looking to one side, and the other looking to the other side. Namely, "ride over" inspections conducted by Roadmaster Bowers and his assistant Casteal. However, the evidence showed that W. H. Casteal was not a FRA qualified inspector, but a crank hand who drove and assisted Bowers for 3 to 4 years. These inspections were not professional, not reasonable, and did not comply with CSXT or FRA regulations. It should have been known to eventually lead to, and end in tragedy.

The men upon whom Defendant relied to conduct company inspections, further testified that inspections were not conducted properly. By the roadmaster's own admission, inspections had been reported as being conducted when in fact, the claimed inspector was on vacation. (Tr. 5/21 p. 15). It was known that inspection reports were false, more like common knowledge. Robert B. Griffith and Allan W. Clamp,

Bower's assistants, both testified that Bowers falsely claimed he made inspections and that the 107 miles of territory claimed as covered by Bowers, could not possibly have been inspected. (Tr. 5/6 p. 26, 106, 111; 5/15 p. 106, 109, 110).

The clear and convincing evidence showed that inspectors checking switches, looked to see if the cross pin could be visualized. However, Bowers testified that he did not know that both ends of the cross pin could be visualized in the switch. (Tr. 5/21 p. 124). The evidence established that for 10 years, inspectors were inspecting a switch that had been installed backwards.

Furthermore, the testimony showed that inspectors would not and could not have visualized the cross pin on the day of, or the day before this incident relying upon their usual inspection practices. The testimony of William E. Gordon (a former Chief Inspector of the FRA), was that the cross pin in the Orlon switch had been broken and missing for at least seven months. (Tr. 4/21 p. 49-50). This was confirmed by the report of James Wildey, a metallurgist for the NTSB,[4] who stated that the pin suffered severe corrosion. This was indicative of Plaintiff's claim that the pin had been out months prior to the accident. Additionally, another metallurgist expert further confirmed that the pin was not in place as contended by Defendant. James Foster testified that metal fatigue had caused the pin to break, thus further corroborating Plaintiff's assertion. (Tr. 5/13 p. 27).

Upon the determination that Defendant's conduct warranted punitive liability here, the parties then presented evidence to assist the triers of fact in calculating the amount warranted. However, statutory guidelines must govern.[5]

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[4] National Transportation Safety Board.

[5] Although the legislature CAPS punitive damages at three-times the compensatory damages before deeming them presumptively excessive, jurors may neither be instructed nor informed of the statutory

Where a jury speaks to a defendant with a punitive sanction which three-times exceeds the compensatory liability, the award is presumed excessive. § 768.73(1). Florida Statutes (1995).[6] However, this presumption of excessiveness is rebuttable.

Presumptively excessive awards may stand only upon a demonstration by "clear and convincing evidence," that the sanction is not excessive in view of the facts and circumstances of the case at issue. *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1983). Under this test of proof, the claimant seeking to uphold the presumptively excessive award must demonstrate that the evidence presented was of such a weight that within the minds of the triers of fact, there was no hesitation as to the allegation(s) sought to be

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limitation. § 768.73(8), Florida Statutes (1995). Nevertheless, the legislature has provided that courts closely scrutinize punitive damage awards for their adequacy staff or excessiveness while exercising caution and discretion in determining whether such an award should be modified or disturbed. § 768.74(6), Florida Statutes (1995).

[6] In pertinent part, Section 768.73(1) provides:

(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability or breach of warranty, and involving willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant may not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the tried of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of act.

established. Moreover, the evidence must be credible, precise, and so explicit that when testified to by the called witness, it was distinctly remembered and there was no confusion as to the facts in issue. *Id.*

Accordingly, for the presumptively excessive $50 million award to stand here, Plaintiff must show and persuade this Court, by clear and convincing evidence, that the evidence produced at trial was such that it created within the minds of the jury and now this Court, a firm belief or conviction as to the truth of the allegation(s) sought to be established.

Defendant now claims that the clear and convincing evidence fails to rebut the presumption that the $50 million is excessive in view of the facts and circumstances here. In addition, Defendant argues that the negligent conduct challenged by Plaintiff Palank fails to rise to the level of culpability warranting the harsh sanction of punitive damages. Accordingly, Defendant argues that remittitur is required, as the clear and convincing evidence fails to show that damages totaling eight-times the compensatory award, is proper here.

Limitation or modification of presumptively excessive punitive jury awards, permits close scrutiny of the reasonableness of the determined amount. § 768.74(3), Florida Statutes (1996).[7] In assessing whether the challenged conduct here warrants the $50 million financial penalty, this Court con-sidered the following criteria in light of the facts and cir-cumstances that were presented to the trier of fact:

(a) Whether the amount awarded was indicative of prejudice, passion, or corruption on the part of the trier of fact;

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[7] This provision provides:

> It is the intention of the Legislature that awards of damages be subject to close scrutiny by the courts and that all such award be adequate and not excessive.

(b) Whether it appeared as though the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amounts of damages recoverable;

(c) Whether the triers of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;

(d) Whether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered; and

(e) Whether the amount awarded was supported by the evidence and was such that the punitive damages amount could be adduced in a logical manner, by reasonable persons.

§ 768.74(5), Florida Statutes (1995).

Further guiding this Court were constitutional considerations guaranteed by the due process clause. However, permissible lines delineated by the Constitution neither require a simple mathematical calculation nor rigid comparison of actual and potential damages to the punitive sanction determined. Gore, ___ U.S. ___, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Instead, the Supreme Court has concluded that constitutional guarantees permit consideration of three factors: (1) the degree of reprehensibility demonstrated by the challenged conduct; (2) the disparity between the harm or potential harm suffered and the punitive damages awarded; and (3) the difference between the remedy and civil penalties authorized or imposed in comparable cases. *Id.* In applying these factors to punitive awards, the Court further added that reprehensibleness provides perhaps the most significant factor. *Id.*

Here, the clear and convincing evidence shows that upon the presentation of all the testimony and evidence and the

conclusion of the trial, CSXT could neither negate nor mitigate the cost of its flagrant violation of the public trust. Keeping with the policy that punitive damages should punish and deter, a jury of six reasonable persons concluded that $50 million would adequately communicate to this Defendant, that this type of reprehensible conduct should not and would not be tolerated.

The jury was presented with an enormous figure by the Plaintiff. However, this jury decided upon $50 million. Finally, in rendering their $50 million penalty, jurors included a handwritten note to express their concern. They wrote, "*It is hoped that CSX trainers will emphasize [the] need to inspect both ends of crosspins.*"

These are not the words of a run away jury. This was a knowing cognoscente jury and their deterrent punishment, sting, if you will, was very reasonable in light of the assets of Defendant which the uncontroverted evidence showed, was over $5 billion.[8]

Industry, especially carriers, must first be safe and then profitable. Not the other way around. Nonetheless, the relentless pursuit of big money has lead many chief operating officers to lose their sense of duty, morals, and ethics to do what is right so that a big enough sting or smart is needed. In this case, it is not only needed, it is justified. Their gross bonuses for coming in with a great bottom line would be better for the public if that money were used for more men and new equipment.

Undoubtedly, the public has the right to feel confident that it can go anywhere, from here to there on a public carrier without being maimed or killed. In too many instances, transportation carriers rely upon old antiquated equipment.

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[8] However, this figure reflects the value of the land at the time of purchase.

Defendant knew what the repercussions of their utter disregard for safety would lead to, and also knew that something terrible had to eventually occur. They are maintenance of way people. They are the carriers transporting freight and human life. They are the experts. Willful and wanton misconduct can only account for this derailment. The clear and convincing evidence showed that the happening of this accident was not only probable, it was inevitable. An accident of this magnitude had to happen.

Death to anyone could have been just around the next switch. The knowledge that Defendant's conduct bespoke, an intentional disregard for human safety, was loud and clear. Defendant's repetitive and callous indifference eventually matriculated into an entire want of care without any regard or lack of conscience, for the safety and welfare of the public. That was Defendant's legacy. That is what the jury addressed and that is what must be changed.

This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. The evidence showed that although cost-cutting measures may have saved Defendant over two billion dollars, society paid the cost with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety to turnover larger profits is too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

Here, critical rail personnel were cut away leaving virtually no way for the company to sufficiently ensured the safety of the rails. Despite Defendant's allegations that cutting-back maintenance of way personnel caused no hazard, the clear and convincing evidence does not support this contention.

Defendant's mechanization argument failed to materialize then as it does now. The clear and convincing evidence showed that the only mechanization brought to the Hamlet Subdivision occurred some 11 to 12 years before the derailment of Silver Star No. 82. The clear and convincing evidence further established that even upon the mechanization of the rail system, live bodies were still required to conduct rail inspections. Yet, the clear and convincing evidence showed that the company continued to eliminate the maintenance of way manpower.

Clearly, Defendant knew of the peril created by its reductions and the company chose to proceed on its own course. The evidence showed that federal rail regulators warned the company and that management turned a deaf ear to those persons, just as it did to the company's own front line rail personnel.

In terms of the rail inspections, the clear and convincing evidence showed repeated patterns of carelessness. The company carelessly reported and accepted track inspection reports when it was blatantly obvious that the information was false.

However, most damaging was the cross pin itself. It told an entire story about the policy and manner in which Defendant administered its duty to provide safe rail to the thousands of railway passengers known to rely on the company. The evidence showed that to keep the device working, "standard" repairs often included jumping up and down on the switch and/or applying "grease" to the apparatus.

The clear and convincing evidence showed that for at least 7 1/2 months, the cross pin lay on the ground buried in granite ballast. The FRA, upon examining the rail north and south of the Orlon switch, found many defects including another missing cross pin.

Subsequent to the derailment of Silver Star No. 82, not one maintenance of way personnel was ever disciplined or fired. (Tr. 5/20 169, 70; 6/4 p. 111, 12; 6/9 p. 60) Despite the derailment, Defendant continues business as usual.

This Court does not find that the $50 million verdict rendered in the instant matter was influenced by prejudice, passion, or corruption or that the jury misconceived the merits of the case. There is no question in this Court's mind that the jury based its verdict on the evidence presented to it. This Court also finds that the jury did not arrive at the amount of damages by speculation and conjecture. This jury accepted the Plaintiff's testimony and that of her witnesses.

It is patently clear that the amount awarded for the death of Paul Palank was supported by the evidence, and was adduced in the logical manner by reasonable persons.

Old common law notions compel that the punishment befit the offense, so long as the punishment does not grossly exceed the severity of the violation, *Gore* —— U.S. ——, 116 S. Ct. 1589, 134 L. Ed. 2d 809, n. 24 (1996). Consequently, under the facts of this case, this Court will not substitiute its judgment for the constitutional judgment of the jury as the evidence meets the statutory criteria of "clear and convincing."

Upon first glance, the verdict rendered here appears to be a little high, but this figure is certainly not so unreasonably high as to shock the conscience of this Court. This Court refuses to now sit as the seventh juror with veto power, amending and altering the expressed outrage of those six persons who faithfully performed their duty to sit and listen to the evidence and decide the case as required by the law. This Court finds that $50 million punitive damage award bears a reasonable relation to the amount of damages proved and the injury suffered.

Here, the consequence of carelessness and greed resulted in death, the ultimate violation. The clear and convincing evidence shows that Silver Star No. 82's tragic derailment was caused by willful, wanton negligence, which is the functional equivalent of manslaughter. In lieu of this $50 million (a mere 1% of CSXT's net worth) is not too much. The clear and convincing evidence further shows that given the facts and circumstances evincing Defendant's egregious conduct and the company's apparent financial gains from this misconduct, Plaintiff has sufficiently rebutted the presumption of excessiveness attached to the $50 million punitive damage award.

In sum, this Court finds no showing of prejudice, passion or corruption on the part of the jury, no indication that the jury ignored the evidence or misconceived the merits of the case when it rendered its verdict; and no proof that the amount of damages was arrived at through speculation and conjecture. Absent a showing of egregious divergence from common sense and reason, a jury verdict should remain intact.

This Court finds that the $50 million punitive damages award for the loss of a 35-year-old husband, father, and otherwise productive human being, is not excessive and is supported by the evidence presented in this case. As such, this Court concludes that the verdict should stand as rendered by the jury, July 30, 1997.

Futhermore, as Defendant CSXT's Motion to Set Aside Verdicts and For Entry of Judgment In Accordance With Its Motion for Directed Verdict, and Motion for New Trial are primarily predicated upon the same arguments raised by its Motion for Remittitur, for the above stated reasons, the Defendant's motions also fail and are therefore denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's Motion for Entry of ~~Judgment~~ is hereby GRANTED. Defendants' Motion for Remittitur, Motion for Directed Verdict in Accordance With Its Motion for Directed Verdict, and Motion for New Trial are DENIED.

DONE AND ORDERED in Chambers, Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, this 9th day of October, 1997.

/s/ Arthur J. Franza
ARTHUR J. FRANZA
Circuit Court Judge

TRUE COPY

ARTHUR J. FRANZA
Senior Circuit Judge

cc: all counsel of record

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of the Constitution of the United States, art. I, § 8, cl. 3, provides:

> SECTION 8. The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Supreme Court, U.S.
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(2)

No. 99-1987

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ANGELICA ROSE PALANK,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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No. 99-1987

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

CSX Transportation's petition for certiorari asks the Court to review this case to decide whether *lawful* out-of-state conduct can serve as the basis for an award of punitive damages. In fact, punitive damages were awarded against CSX for *unlawful* disregard of federal safety regulations and for fraudulent reporting.

Irrespective of how one characterizes CSX's conduct, it is clear from the briefs and decision below that CSX (1) did not include its constitutional claims in its petition for review in the Supreme Court of Florida, (2) did not raise its Commerce Clause argument in the Florida District Court of Appeal, and (3) did not assert its Due Process claim in timely

fashion in the trial court. As a result, the issues CSX asks this Court to decide were never passed on by the courts below.

Finally, the conflict that CSX invokes to justify a grant of certiorari here does not really exist. It consists almost entirely of a disagreement in dicta between a Tenth Circuit opinion and a decision of the Florida District Court of Appeal in another case. Moreover, that theoretical difference of opinion is not even implicated by this case. What happened here was merely what this Court expressly said was permissible in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 n.21 (1996): Out-of-state conduct was placed before the jury because it was "relevant to the determination of the degree of reprehensibility of the defendant's conduct." Every court that has considered the issue since *Gore* – including the Tenth Circuit – has agreed that such use of out-of-state conduct is constitutionally permissible.

STATEMENT

A. The Accident

Respondent Angelica Palank is the widow of Paul Palank, who was a Florida resident. Mr. Palank was killed on July 31, 1991, when the train on which he was a passenger derailed on tracks owned and maintained by petitioner CSX, a company headquartered in Jacksonville, Florida. The deceased's trip began in Hollywood, Florida, traveled virtually the full length of Florida, and ended with the derailment in South Carolina. It was stipulated that the accident was caused by a switch that malfunctioned as the train passed over it, sending cars at the back of the train off onto a different track from the lead cars. Tr. 6754.[1] Eight passengers were killed, and 90 passengers and crew members were injured. Tr. 7691.

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[1] "Tr." is the transcript of the trial proceedings.

B. The Trial

Mrs. Palank brought suit against CSX in a Florida state trial court on behalf of herself, her children, and her husband's estate. Because CSX did not contest liability for compensatory damages, the trial proceeded, at CSX's request, in three phases: a first phase to set the amount of compensatory damages; a second phase to determine whether punitive damages were warranted; and a third phase to determine the amount of punitive damages. The first phase resulted in a compensatory damages verdict of over $6 million, which is not at issue here. *See* Pet. App. 4a. In the second phase, a different jury held CSX liable for punitive damages, and in the third phase, the jury set the amount of punitive damages at $50 million. *Id.* CSX identifies Mrs. Palank personally as the sole respondent in this case, but the punitive damages were awarded only to her husband's estate.

The evidence presented at the second phase of the trial showed that the cause of the accident was a broken crosspin in the switch. The switch had been broken for seven months, and an adequate safety inspection at any time during that period would have detected the problem. Although CSX personnel were aware that there was some problem with the switch, they did not conduct an adequate inspection. Pet. App. 7a, 35a.

The evidence presented during the second phase of the trial further established that CSX's failure to inspect the switch where the accident occurred was a part of a larger pattern of reckless disregard for adequate safety inspections, failures to comply with federal safety regulations, and false reporting that adequate inspections had been performed – a pattern that was manifested not only in the area where the accident occurred, but throughout CSX's system. The evidence showed that this pattern of corporate recklessness and indifference to proper safety procedures was the result of a massive downsizing of CSX's inspection and maintenance

crews across the country, undertaken to cut costs and increase profits. *See* Pet. App. 7a-11a, 20a-21a, 26a-29a, 34a-35a.

Mrs. Palank's counsel did not argue that CSX should be punished for lawful conduct or personnel reductions. Rather, counsel for Ms. Palank relied on this evidence in arguing to the jury during the second phase that CSX had put profits ahead of concern for human lives. *E.g.*, Pet. 3. Counsel for CSX did not object to these arguments (or, indeed, to any of the arguments quoted in the petition for certiorari).

CSX did not ask that the jury be instructed during the second phase of the trial that it could not consider CSX's out-of-state manpower reductions in determining whether to award punitive damages. Only after the jury had determined that punitive damages should be awarded and the case moved on to the third phase for the determination of the amount of such damages, did CSX request that the jury be instructed that it could not impose punitive damages for the purpose of deterring CSX from engaging in "lawful" conduct outside Florida. The court rejected CSX's request as untimely. Tr. 13843.

After the third phase of trial ended with the jury's award of $50 million in punitive damages, CSX moved to set aside the judgment on the ground that it was excessive. The trial judge denied the motion, stating (Pet. App. 34a):

> This Court finds the evidence to be clear and convincing, sufficiently showing that Defendant's conduct in breaching its duty, was deliberate, reckless, willful, and wanton, evincing a reckless disregard for the safety of rail passengers and the public at large. The evidence showed that although cost-cutting measures may have saved [the] Defendant over two billion dollars, society paid the cost with eight human lives. The clear and convincing evidence showed that the price of cost-cutting safety

to turn over larger profits it too great of a price. This not only bespeaks culpable negligence, it is borderline criminal.

C. The Appeal

CSX appealed, raising primarily state-law issues relating to the size of the verdict, Florida's statutory presumptive cap on punitive damages, and evidentiary issues. The argument headings in CSX's Initial Brief in the District Court of Appeal were:

I. As a Matter of Law the Evidence Does Not Support an Award of Punitive Damages

II. CSXT Is Entitled to a New Trial

III. A Substantial Remittitur Is Required

As one of several challenges to the jury instructions, CSX said the following in a footnote in the section requesting a new trial (Appellants' Initial Brief, p. 43 n.39):

> The failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585.

In response, Ms. Palank's brief stated (Answer Brief of Appellees, p. 46; citations omitted):

> It is clear [that] CSX has waived its right to challenge the liability verdict on federal constitutional grounds since it never requested jury instructions along those lines, nor objected to Plaintiff's proposed instructions

on that basis. Also, the fact that CSX made no federal constitutional arguments during the liability trial waived its rights to make those arguments on appeal.

The Florida District Court of Appeal affirmed. Finding that the evidence as a whole showed reckless disregard of passenger safety, the court held that punitive damages were justified under Florida law and that the circumstances were egregious enough to support an award exceeding the statutory cap (Pet. App. 3a-16a). The court's opinion did not even mention CSX's federal constitutional claim.

CSX petitioned the Florida Supreme Court for discretionary review, asserting as a basis for jurisdiction only that the Court of Appeal's decision conflicted with other Florida decisions. CSX's petition did not invoke the Florida Supreme Court's jurisdiction to review Court of Appeal decisions resolving issues of federal constitutional law. The Florida Supreme Court denied review without comment.

REASONS FOR DENYING THE WRIT

I

THE FEDERAL QUESTIONS CSX ASKS THIS COURT TO REVIEW WERE NEITHER PROPERLY PRESENTED TO NOR DECIDED BY THE FLORIDA STATE COURTS

A. No Constitutional Issue or Federal Question Was Presented to the Florida Supreme Court.

This Court's certiorari jurisdiction over state-court judgments under 28 U.S.C. § 1257 extends only to decisions that resolve questions of federal law. "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Directors of Rotary*

Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)). *Accord, e.g., Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). A petitioner seeking this Court's review of a state-court judgment must show that the state court system had "a fair opportunity to address the federal question that is sought to be presented here." *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. at 501).

A litigant who bypasses his chance to present a federal issue to a state supreme court through a petition for discretionary review has failed to give the state courts a "fair opportunity" to address the issue. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-45 (1999). *See also Banks v. California*, 395 U.S. 708 (1969); *Stembridge v. Georgia*, 343 U.S. 541 (1952). A petitioner may not "draft his own rules of procedure in order to raise the [federal] claim only before those [state] courts which he deems appropriate." *Costarelli v. Massachusetts*, 421 U.S. 193, 197 (1975). If the issue can be heard in the state supreme court, the petitioner must raise it there. *Id.*

CSX states that "[t]he Supreme Court of Florida denied review" of the District Court of Appeal's opinion – implying that CSX had actually sought review of the constitutional issues it now raises. Pet. 7. What CSX fails to mention, however, is that its petition for discretionary review by the Florida Supreme Court did not invoke that court's jurisdiction to resolve any federal constitutional issues.

CSX's brief on jurisdiction in the Florida Supreme Court requested only that the court exercise its jurisdiction under that court's Rule 9.303(a)(2)(A)(iv) to resolve a supposed conflict between the Court of Appeal's decision and other Florida decisions *on matters of state law*. The words "Due Process" and "Commerce Clause" do not even appear in CSX's papers in the Florida Supreme Court. Nor is there any

other indication that CSX's petition sought to raise a federal issue before that court.

B. Federal Issues Were Neither Properly Raised Nor Decided in the Lower Florida Courts.

The decision of the District Court of Appeal can be searched in vain for any mention of the constitutional issues that CSX asks this Court to address. CSX disingenuously suggests that the Court of Appeal rejected its constitutional claims in reliance on its own prior decision in *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So. 2d 603 (Fla. App. 1998), *aff'd*, 749 So. 2d 483 (Fla. 1999).[2] But the only mention of *Ballard* in the Court of Appeal's opinion in this case was a citation concerning a purely state-law issue: the standard under a Florida statute for granting a remittitur of a punitive damages award (Pet. App. 12a). The court's citation of *Ballard* plainly had nothing to do with either constitutional issue CSX now raises. Nor is there anything else in the court's opinion that so much as adverts to such issues.

"This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Webb v. Webb*, 451 U.S. at 495 (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). *Accord, e.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Board of Directors v. Rotary Club*, 481 U.S. at 550. CSX cannot overcome this presumption.

As to its Commerce Clause arguments, CSX's petition relies on the statement in its brief in the Court of Appeal that

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[2] The Florida Supreme Court's affirmance in *Ballard* did not reach the federal constitutional issue because the defendant in the case, like CSX, did not present the issue to that court.

"[t]he jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation.. *See Gore*, 517 U.S. at 585." (Pet. 5.) But the quoted language comes from a *footnote* in CSX's appeal brief. Moreover, this single sentence in a footnote – which does not even contain the words "Commerce Clause" – is the *only* place in either CSX's principal brief or its reply brief where commerce-related concerns are alluded to.

Such passing references to constitutional issues do not, by this Court's standards, preserve a constitutional claim in a state appellate proceeding. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). *See also Webb v. Webb*, 451 U.S. at 496 (holding that a brief reference in the state court to "full faith and credit" did not preserve a claim under the Full Faith and Credit Clause); *DeBacker v. Brainard*, 396 U.S. 28, 32 (1969) (holding that a "passing reference" to an issue in state court briefs did not properly preserve the issue for review).

Florida courts have also repeatedly held that referring to an issue "only by way of a footnote" "does not elevate the matter to a point on appeal." *Simkins Indus., Inc. v. Lexington Ins. Co.*, 714 So. 2d 1092, 1093 (Fla. App. 1998). *Accord, e.g., Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Kaufman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958); *Vaughn v. Vaughn*, 714 So. 2d 632 n.1 (Fla. App. 1998). In light of this clear Florida rule (which is in accord with the generally accepted appellate principle that "arguments raised only in a footnote or in a perfunctory manner are waived," *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 n.17 (1st Cir. 1999)), it is apparent that the reason the Court of Appeal did not pass on the

Commerce Clause issue is that no such issue was properly presented to it.

Nor was CSX's constitutional claim under the Due Process Clause and *BMW v. Gore* preserved in the trial court. Evidence of CSX's "out-of-state conduct," which CSX now contends cannot be used as the basis for an award of punitive damages, was presented to the jury during the second phase of the trial, during which the jury considered whether an award of punitive damages was justified. At that time, CSX did not object on Due Process grounds. Nor did it propose that the jury be instructed that it could not base its decision whether to impose punitive damages on out-of-state conduct. Only after the jury had decided to award punitive damages and the trial had moved to the next phase, during which the amount of damages was considered, did CSX belatedly propose instructions that the jury could not base a decision to award punitive damages on out-of-state conduct. The trial judge denied the instructions as untimely.

Hence, the Court of Appeal's failure to address CSX's federal constitutional claims appears to rest on the conclusion that they had not been properly preserved. *See Campbell v. Louisiana*, 523 U.S. at 403; *Webb v. Webb*, 451 U.S. at 495-96. This procedural basis for the court's decision precludes review in this Court.

II

THE PUNITIVE DAMAGE AWARD WAS BASED ON CSX'S UNLAWFUL VIOLATIONS OF SAFETY REGULATIONS AND NOT ON ITS "LAWFUL PERSONNEL REDUCTIONS"

CSX's question presented asks this Court to determine whether the Due Process and Commerce Clauses permit it to be subjected to punitive damages by the State of Florida for lawful out-of-state conduct. But that question is not remotely

posed by this case. CSX cannot pretend that it was punished in this case under Florida law for engaging in "lawful personnel reductions in other states." Rather, it was punished for conscious disregard of passenger safety in violation of federal regulations – conduct that was part of a nationwide pattern resulting in large measure from CSX's profit-motivated "downsizing" of the personnel who carried out safety inspections. Such a pattern of recklessness and disregard of the safety of passengers is not "lawful" anywhere.

The evidence credited by the jury in this case established (1) that CSX did not inspect the mainline switch for more than seven months, in flagrant violation of a federal regulation (49 C.F.R. § 213.233) that requires inspection twice a week, (2) that CSX filed reports with the Federal Railroad Administration ("FRA") in which it falsely certified that the tracks had been inspected when, in fact, it knew they had not, and (3) that CSX's reports to the FRA deliberately underreported derailments and accidents. An FRA audit of CSX's Baltimore Division had specifically alerted CSX to systemic problems, including derailments, resulting from inadequate inspections due to reduction of maintenance personnel, but CSX had taken no corrective actions.

CSX's "personnel reductions" may have been among the reasons why this recklessness and false reporting occurred, but the reductions were not themselves the grounds for imposition of punitive damages. The "kind[s] of efficiencies" (Pet. 14) that Congress contemplated in restructuring the nation's rail system did not include skipping inspections and false reporting – conduct which is unlawful in every state.

The judgment that CSX is challenging in this case vindicates federal safety policies. If CSX's deliberate decision to reduce its maintenance-of-way personnel by 50 percent and to forbid overtime by its employees produced

this dangerous situation, that does not entitle CSX to claim immunity on the ground that it did no more than implement a "lawful personnel reduction."

III

THERE IS NO CONFLICT OF DECISIONS

CSX argues that the Court should take this case because there is a conflict of authority over the question of whether a state court may award punitive damages based upon unlawful conduct in another state. The allegedly conflicting authorities marshalled by CSX are, on one side, *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997), and *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. App. 1999), *cert. denied*, 120 S. Ct. 1424 (2000); and, on the other side, the Florida District Court of Appeal's decision in *Owens-Corning Fiberglas Corp. v. Ballard, supra.*

But the Florida court did not purport to apply its decision in *Ballard* to this issue in this case. It rejected CSX's position with no discussion at all, probably because the issue had not been preserved. *See* pp. 8-10, *supra.*

Moreover, there is, in fact, no true conflict that justifies the intervention of this Court. This Court's Rule 10(b) states that one circumstance favoring a grant of certiorari is the existence of a conflict between a federal court of appeals and a state court *of last resort*, or between two state courts *of last resort*. Conflicts involving state intermediate appellate courts, where the relevant state courts of last resort have not yet had occasion to decide an issue, are like conflicts between federal district courts – not adequate reason for the Court's review.

In any event, the conflict, upon inspection, turns out not to be a real one. In *Continental Trend Resources*, the Tenth Circuit was faced with the argument that a punitive damages award in a lawsuit arising out of tortious conduct in

Oklahoma was improperly based in part on the defendant's similar misconduct in other states. The *holding* of the Tenth Circuit was that because the evidence had "focused on [the defendant's] Oklahoma activities" (101 F.3d at 637), there was no reason to believe that the defendant had been punished for out-of-state activities, and no need for the jury to have been instructed to limit its consideration to conduct in Oklahoma. *Id.* at 638. In light of this holding, the court's observation that it "read the opinion [in *Gore*] to prohibit reliance upon inhibiting unlawful conduct in other states" (*id.* at 637), was pure dictum. And even that non-dispositive observation was tempered by the court's simultaneous recognition – applicable to this case – that "[o]ut-of-state acts may be used to show the degree of reprehensibility of a defendant's conduct." *Id.* at 638.

The Florida District Court of Appeal's comments on the subject of out-of-state conduct in the *Ballard* case were, similarly, dicta. In *Ballard*, a Florida resident suffering from terminal lung cancer brought suit against the asbestos manufacturer whose products had caused his disease. The defendant argued on appeal that because the plaintiff had been exposed to its products only in other states before he moved to Florida, the Florida courts could not award him any punitive damages even though the defendant's conduct had been unlawful in the states where it occurred. Discussing this improbable extension of *Gore*, the District Court of Appeal quoted the Tenth Circuit's opinion in *Continental Trend Resources* and noted that it did not "find *Continental*'s interpretation of *BMW* helpful or persuasive." *Ballard*, 739 So. 2d at 606. But the court did *not* rest its decision on its disagreement with the *Continental Trend* dictum. Rather, the Florida court held that the defendant had waived its argument by stipulating before trial that the plaintiff's entitlement to punitive damages was an issue for the jury to decide.

As for the Indiana Court of Appeals' decision in *Ammerman*, it merely held that it was inappropriate under

BMW v. Gore for a jury to award punitive damages that were calculated by adding up the defendant's profits in out-of-state transactions. That, of course, is not what occurred in this case (nor was it the issue in either *Ballard* or *Continental Trend*). And nowhere did the court in *Ammerman* suggest that it was improper to consider that the over-all pattern of the defendant's conduct – including out-of-state conduct – indicated that the defendant had adopted a conscious policy of engaging in unsafe practices to increase its profits.

Finally, in a recent decision overlooked by CSX, the United States Court of Appeals for the Tenth Circuit – the very court that CSX uses as the poster child for its claim of a conflict – has held directly that a jury may consider the reprehensibility of a defendant's unlawful conduct in other states when awarding punitive damages. The decision, *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235 (10th Cir. 2000), involved a New Mexico accident in which a worker was injured by a pavement milling machine manufactured by the defendant. The plaintiff introduced evidence of similar accidents in other states to show that the defendant was aware of a dangerous design flaw in its product and had persisted in placing the flawed product on the market despite this awareness.

The Tenth Circuit approved because the evidence of out-of-state incidents was properly "offered to illustrate the reprehensibility of [the defendant's] conduct." *Id.* at 1253.

Smith v. Ingersoll-Rand Co. refutes CSX's assertion that the Tenth Circuit forbids reliance on evidence of out-of-state actions by a defendant for assessment of its reprehensibility. Nor is *Smith* alone in this regard. Many other state and federal courts since *Gore* have arrived at the same result. *See, e.g., Parsons v. First Investors Corp.*, 122 F.3d 525, 531 n.2 (8th Cir. 1997); *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999); *Ex parte LifeUSA Ins. Co.*,

No. 1981504, 2000 Ala. LEXIS 159 (Ala. April 21, 2000); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 467 (Idaho 1996); *Schaeffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996); *Owens-Corning v. Thompson*, No. 05-98-00231-CV, 2000 WL 764930 (Tex. App. June 14, 2000). The award of punitive damages in this case is fully consistent with this uniform body of case-law, which in turn stems directly from this Court's decisions *Gore* and *TXO*.

CONCLUSION

CSX's petition seeks to manufacture a decisional conflict over federal issues that were neither properly presented nor decided below. In fact, there is no relevant split of authority, and the consideration by the jury of CSX's reprehensible nationwide conduct, which was directly linked to the death of the plaintiff's husband, is fully consistent with this Court's decisions as well as with every other post-*Gore* decision addressing the issue.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1987

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

One matter which is a serious and growing concern to railroads is the frequency with which civil juries are punishing defendants in general, and railroads in particular, through the imposition of substantial punitive damages awards. Railroads have a presence in 49 states, where 559 freight railroads operate over nearly 170,000 miles of track.[2] If an accident occurs involving a member of the general public, railroads usually are subject to lawsuits under state law.[3] In 1998, railroad accidents resulted in 1047 such lawsuits being filed.[4] These suits typically are brought by rail passengers, motorists involved in grade crossing accidents or trespassers on railroad property. In many such cases railroads are tempting targets for punitive damages because their extensive interstate operations often put them in a position to be portrayed in the litigation as wealthy out-of-state corporations. *See infra pp.* 6-8.

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[2] Association of American Railroads, *Railroad Facts* 3 (1999 ed.). Amtrak, the nation's intercity passenger railroad, operates over 24,500 miles of track, most of which is owned by freight railroads. *Id.* at 77.

[3] Railroads generally are regulated under federal law, including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which covers injuries to employees. However, state tort law usually applies in cases where non-employees are injured, though, depending on the circumstances, some claims may be preempted. *See e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993)(state law duties to select and install crossing warning devices preempted when federal funds are used to install the devices, and state claims that a train was operated at an excessive rate of speed preempted when train was traveling within the federal track speed limits); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (state law claim that locomotive should have been equipped with strobe and oscillating lights not required by federal regulation was preempted).

[4] Association of American Railroads, *1998 Claim & Litigation Report* 3-7 & 3-8 (Aug. 1999).

AAR has a particular interest in this case because it resulted in an immense ($50 million) punitive damages award against one of its member railroads, exceeding by $19 million the highest previous punitive damages award in the state. *See* Petition at 10. This verdict followed a trial marred by highly prejudicial error, in which the court permitted respondent's counsel to urge the jury to return an award of punitive damages based on personnel decisions made by petitioner outside the forum state. The state appellate court's approval of this outcome, left undisturbed by the state's highest court, all but ignored this Court's admonition that "a State may not impose economic sanctions on violations of its law with the intent of changing the tortfeasor's lawful conduct in other States."[5] While the appellate court approved this tactic as simply showing the defendant's motive, *CSX Transp. v. Palank*, 743 So. 2d 556, 560 (Fla. App. 1999), the proceeding below clearly amounted to the state levying an unconstitutional punishment based on the defendant's extraterritorial conduct. Moreover, through this punishment, the state court is attempting to influence national railroad policy by taking aim at legitimate conduct that has long been the subject of federal oversight. *See infra* Part II. As a representative of an industry whose large members each face exposure to substantial punitive damages in numerous states, AAR has an interest in assuring that the constitutional rights of civil defendants are clearly defined and preserved.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

In this case, arising from a railroad accident, the court allowed the plaintiff, in the course of a plea to the jury to return a large award of punitive damages, repeatedly to urge that the defendant be punished for lawful conduct undertaken in

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[5] *BMW of North America v. Gore*, 517 U.S. 559, 572 (1996).

numerous states. This tactic, approved by the state appellate court, violated the important constitutional principle, enunciated by this Court, that a state may not exact a punishment on civil defendants based on conduct outside the state's borders. The court's erroneous ruling resulted in an immense punitive damages award of $50 million.

The award in this case was not an isolated incident: in recent years, a number of multimillion dollars punitive damages awards have been returned against railroads. Large railroads conduct business in multiple states, and their operations, of necessity, must be uniform throughout their systems. Thus, railroads are particularly susceptible to being punished for conduct that occurred outside the state where the conduct giving rise to the cause of action occurred. Without guidance from this Court on the constitutional limits on punitive damages where the defendant operates in multiple states, railroads and numerous other defendants will continue to be so exposed.

Not only did the jury target extraterritorial conduct, it sought to punish legitimate personnel decisions that have long been the subject of federal regulation. In this case, the conduct at issue was reduction in the railroad's workforce that occurred during a time of industry consolidation that followed a major deregulatory effort by Congress. In various statutory enactments, Congress has long acknowledged the benefits of railroad consolidation and recognized that it inevitably would lead to force reductions, specifically making provisions to assist affected employees. To permit a jury to use a railroad's system-wide force reductions as a basis for assessing punitive damages is an improper attempt by the state to influence national rail policy, as well as a deprivation of the defendant's constitutional r[illegible]s.

ARGUMENT

I. AS COMPANIES WITH EXTENSIVE INTERSTATE OPERATIONS RAILROADS HAVE A STRONG INTEREST IN ASSURING THAT STATES ARE PROHIBITED FROM PUNISHING EXTRATERRITORIAL CONDUCT IN DISREGARD OF THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN *BMW V. GORE*

In disregard of this Court's rulings on the constitutional principles applicable to state awards of punitive damages, the court below has sent a loud and clear message to all interstate railroads that their conduct in every state in which they do business, however legitimate, may serve as the basis for punishment in any other state in which they operate. At the trial below, urging a jury to return a substantial punitive damages award against CSX Transportation, respondent asked the jury members to focus on a lawful activity undertaken over a period of years by CSX and its predecessor railroads: reductions in force occurring in a consolidating, and newly deregulated, industry. *See* Petition at 3. As a benchmark for the punishment it was asked to mete out, the jury was further entreated to focus on a specific monetary figure, allegedly related to force reductions throughout the entire CSX rail system, an area covering numerous states. *See id.* Allowance of this tactic in a trial on punitive damages, without so much as a jury instruction on the limits of a state's authority to punish civil defendants, runs afoul of this Court's recent punitive damages jurisprudence and deprived the petitioner of its constitutional rights. *See infra* pp. 9-10.

A. Railroads Have Increasingly Become Targets for Punitive Damages

The punitive damages award returned against petitioner in this case was not an isolated event for the railroad industry: in recent years, the threat of large punitive damages awards has

been transformed from an academic consideration to a reality of doing business, with profound financial consequences for the nation's railroads.[6] Last year, a Missouri jury awarded the staggering sum of $120 million in punitive damages to a plaintiff injured in an accident at a rail-highway grade crossing between an Amtrak train and an automobile in which she was a passenger. *Alcorn v. Union Pacific R.R.*, No. CV-97-31927 (Circuit Court, Jackson County, Mo.) (The court has reduced the award of punitive damages to $50 million and an appeal is pending in the Missouri Supreme Court.) Of almost equal size was a punitive damages award of $44 million in a case arising from a crossing accident in El Paso, Texas. *Atchison, Topeka & Santa Fe Ry. v. Cruz*, No. 08-97-00639-CV (County Court at Law No. 4, El Paso County, Tx.) (An appellate court subsequently struck the award of punitive damages. An appeal to the Texas Supreme Court is pending.)

States have moved aggressively to punish railroads and shape their conduct even where it is questionable that a legal duty has been breached. For example, a six million dollar punitive damages award was assessed against Conrail by a jury in Ohio, and upheld by a state appellate court, as the result of a grade crossing accident in which the railroad was alleged to have failed to install adequate warning devices at a crossing which had been upgraded with federal funds. *Garrett v. Consolidated Rail Corp.*, 697 N.E.2d 1109 (Ohio App. 1997), *discretionary*

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[6] The recent wave of crushing punitive damages awards has come as the rail industry continues a two-decade long trend of greatly improved safety. Notably, during the twenty year period between 1979 and 1998, the number of railroad accidents declined by 72 percent, Federal Railroad Administration, *Accident/Incident Bulletin, Calendar Year 1979* at 9 (1980)(Table H3) and Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998* (July 1999) (*1998 Safety Statistics*) ch.1, p. 7 (Table 1-1), and the number of fatalities from grade crossing accidents decreased by 48 percent. Federal Railroad Administration, *Highway-Rail Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1979* at 8 (1980)(Table 3) and *1998 Safety Statistics* at ch. 7, p.6 (Table 7-1).

appeal denied, 686 N.E.2d 273 (1998). The court held that Conrail could be liable for punitive damages because it did not "voluntarily [take] steps to evaluate the safety of its crossings nor independently upgrade its hazardous crossings without an order from the PUCO" (the state agency with jurisdiction over rail-highway grade crossings). 697 N.E.2d at 1124. The punishment stood even though this Court has left no doubt that because federal funds participated in the installation of the crossing warning devices, Conrail's conduct could not even have served as the basis for finding breach of a duty, let alone rise to the level of misconduct required to justify punitive damages. *Norfolk Southern Ry. v. Shanklin*, 120 S. Ct. 1467 (2000). ("What States cannot do once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." 120 S.Ct. at 1476.)[7]

More recently, the courts in Ohio let stand a punitive damages award of $15 million against Conrail in another case arising out of a grade crossing accident (a liability which has now been acquired by the Norfolk Southern Railroad).[8] *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999), *cert.*

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[7] Though *Shanklin* was decided subsequent to the ruling in *Garrett*, *Shanklin* merely reaffirmed this Court's 1993 holding in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), which preceded *Garrett* by several years. Moreover, at the time *Garrett* was decided, three U.S. Courts of Appeal had held that participation of federal funds in the installation of crossing warning devices preempted state law claims of the nature made in *Garrett*. *See Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996). At very least, there was a serious question as to whether the railroad's conduct was even tortious, but that did not deter the state court from approving not just the finding of liability, but also the jury's severe punishment.

[8] Since the verdicts in *Garrett* and *Wightman*, part of Conrail has been acquired by Norfolk Southern.

denied, 120 S.Ct. 1286 (2000). In *Wightman*, the Ohio court permitted a plaintiff's expert to opine to the jury about other unspecified similar accidents that had occurred nationwide, *id.* at 551-52, no doubt opening the door for the jury to punish the defendant for conduct occurring in other states. This was particularly egregious because, in addition to having occurred in other states, these other incidents most likely did not even involve the defendant.[9]

Perhaps the most stunning verdict against a railroad was a punitive damages award of $2.5 billion in Louisiana, also against petitioner, in a case arising from a leaking tank car, owned by another company, that happened to be on the property of CSX at the time. *In re New Orleans Train Car Leakage Fire Litigation*, No. 87-16374 (Civil District Court for the Parish of Orleans, La.). This incident resulted in the precautionary, temporary evacuation of several thousand people from their homes, but caused no serious injuries. In a ruling on post trial motions, the court recently reduced the punitive damages award to a "mere" $850 million.[10] Even as this case and others wend their way through the appellate process, civil juries are being asked to punish railroads with alarming frequency (one large railroad has reported to AAR that it is defending about 70 pending lawsuits in which punitive damages are being sought), and in substantial amounts. *E.g.*, *Hawkins and Cox v. Illinois Central R.R.*, No. 95-0217 (Circuit Court, Holmes County, Ms.)

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[9] In another case where Conrail was assessed multiple seven-figure punitive damages awards arising from a crossing accident, the driver of the car was found to be 55% at fault. *Moore v. Consolidated Rail Corp.*, Nos. 1995CV01185; 1995CV01196; 199600016 (Court of Common Pleas, Stark County, Ohio), *aff'd*, Nos. 1996-CA-00317; 1996-CA-00323 (1996 Ohio App.), *discretionary appeal denied*, 688 N.E.2d 1043 (1998).

[10] This represented the punitive damages against only one railroad, CSX Transportaion. Additional punitive damages awards, exceeding $100 million, were made against other railroads with some connection to the incident. These other railroads ultimately settled the case while post trial motions were pending.

(Plaintiffs are seeking $45 million in punitive damages in a lawsuit arising from a crossing accident.)

B. The Punitive Damages Award In This Case Should Be Reviewed By This Court Because It Violates The Prohibition Against States Punishing Civil Defendants For Extraterritorial Conduct

The prevalence of multimillion dollar punitive damages awards against railroads has heightened the industry's concern over the disregard that some lower courts have shown for this Court's rulings on the constitutional safeguards that must be adhered to in trials on punitive damages. This Court has made it clear that when states seek to impose punishment in civil trials, the defendants are entitled to the protections of the Due Process clause of the constitution. "[I]t is not disputed that a jury award [of punitive damages] may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). In *BMW of North America v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause prohibits a State from imposing punitive damages that are " 'grossly excessive' in relation to" the state's legitimate interest in punishment and deterrence of a tortfeasor's conduct. *Id.* at 568.

Any inquiry into the constitutionality of an award of punitive damages must first identify and evaluate the state's interests that are served by the punishment, which of necessity are limited to protecting its own citizens. *Id.* at 568-572. This Court explained that because a state may not legislate, or punish, beyond the bounds of its jurisdiction, punitive damages may not be assessed with the aim of affecting the defendant's conduct in

other states, *id.* at 569-74,[11] regardless of whether the state's own citizens might be affected by the defendant's conduct when they traveled to another state.[12] In *BMW*, the Alabama Supreme Court had ordered a remittitur of the jury's award to eliminate the portion of the punitive damages award based on the defendant's conduct outside of Alabama. Thus, beyond noting that the Alabama court "correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction," this Court did not address in any detail how a state may properly measure punitive damages against a defendant that engages in activities beyond the state's borders.[13]

Guidance on this important issue is essential because today it is probably the exception rather than the rule where a defendant does not conduct business or other activities outside the forum state. Certainly this is the case with the nation's freight railroads and Amtrak, whose operations cover a large number of states.[14] Moreover, because of the nature of their operations, a

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[11] This Court also explained that a state's attempt to reach conduct beyond its borders improperly burdens interstate commerce. 517 U.S. at 571-72. The principle that the constitution precludes states from imposing a penalty calculated to punish or deter a civil defendant's conduct occurring beyond the state's borders was followed by the Tenth Circuit in *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)("[T]he punitive damage award must relate to conduct occurring within the state." 101 F.3d at 636), a holding rejected outright by the court below. *See* Petition at 12.

[12] 517 U.S. 571, n. 16, citing *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

[13] 517 U.S. at 574, n. 21. This Court went on to hold that when limited to Alabama's legitimate interests in punishment and deterrence, the reduced award of $2 million was still "grossly excessive."

[14] The nations four largest freight railroads all have operations in over 20 states. *See* Class I Railroad Annual Report for 1999 (Form R-1) of Burlington Northern Santa Fe; CSX Transportation; Norfolk Southern Railroad; and Union Pacific Railroad, submitted to the Surface

railroad's policies and practices must be consistent and cohesive throughout its system: thus, virtually every action a railroad takes in a particular jurisdiction is likely to be mirrored in other states. Inasmuch as ever-increasing awards of punitive damages against railroads (and other defendants) with a multi-state presence have become a common occurrence, this Court should take the opportunity presented by this case to articulate the constitutional limits on a state court's authority to impose punishment aimed at a defendant's extraterritorial conduct.

II. THE AWARD BELOW PUNISHED CONDUCT WHICH HAS LONG BEEN CONTEMPLATED BY THE NATIONAL RAILROAD POLICY SET BY CONGRESS

The need for this Court to clarify the permissible limits of states' authority to punish tortfeasors for extraterritorial conduct has particular salience for railroads, not only because of their recent experience with punitive damages verdicts, but also because they are the archetypal instrumentality of interstate commerce. Railroads have historically been, and to some extent remain, pervasively regulated at the federal level, beginning in the Nineteenth Century with the Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (1887). Indeed, the guiding principle of federal regulation of the railroads has been Congress' recognition that in order for the national rail network to operate efficiently and effectively, uniformity with regard to operations must be maintained.[15] To the extent state juries are permitted to

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Transportation Board. Amtrak operates in 45 states nationwide. *See* Amtrak Website, http://www.amtrak.com/news/pr/factsheet.html.

[15] *See* 49 U.S.C. § 20106 "Laws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." The Interstate Commerce Commission Termination Act of 1995 grants exclusive jurisdiction to the Surface Transportation Board (the federal agency that assumed the remaining functions of the Interstate Commerce Commission when the latter agency was abolished) over virtually every aspect of rail operations. 49 U.S.C. § 10501(b).

consider a railroad's system-wide conduct as a basis for exacting punishment for harm occurring within the state's borders, it raises the specter not just of states imposing their "own policy choices on neighboring States" *BMW supra*, 517 U.S. at 571, but also on national railroad policy.

Of particular relevance to this case is that as part of its national regulatory scheme, Congress has long contemplated consolidation of the railroad industry and has seen reductions in the railroad workforce as a legitimate and inevitable consequence of such consolidation. As early as 1920, Congress recognized that rationalization of the railroad industry would be necessary to its continued viability and gave the Interstate Commerce Commission (ICC) jurisdiction over railroad mergers, consolidations and abandonments. Transportation Act of 1920, § 1(18), 41 Stat. 456 (1920); *See Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486, 492 (1968) ("[E]ncouraging consolidation of the Nation's railroads" had been a congressional policy for over 45 years.). Congress further recognized that consolidation brings job loss, and during the high unemployment of the depression imposed a moratorium on job reductions in the Emergency Railroad Transportation Act of 1933. *See New York Dock Ry. v. United States*, 609 F.2d 83, 86 (2nd Cir. 1979). This was followed by the implementation of private agreements between railroads and employee organizations granting certain protections to employees to ameliorate the impact of consolidations.[16] The ICC soon began routinely to impose labor protection as a condition of approval of railroad transactions. *See United States v. Lowden*, 308 U.S. 225 (1939) (Upholding the ICC's authority to impose labor protection conditions in a consolidation.) Shortly thereafter, in the Transportation Act of 1940, § 5(2)(f), 54 Stat. 898 (1940),

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[16] Part of the Washington Job Protection Agreement of 1936 (WJPA), these protections took the form of severance payments and other benefits for varying periods of time after the transaction. *See New York Dock*, 609 F.2d at 86-87, for a background and summary of the WJPA.

Congress mandated protection of employees as a condition of approval of mergers, consolidations and acquisitions. In the ensuing years, the railroad industry has continued to rationalize, and, in anticipation of this trend, federal law has continued to mandate certain levels of employee protection as a condition of the underlying transactions. 49 U.S.C. § 11326; *See New York Dock Ry.-Control-Brooklyn Eastern Dist. Ter.*, 360 I.C.C. 60 (1979) (Establishing labor protection conditions in railroad acquisitions.)

After Congress approved substantial economic deregulation of the railroad industry through the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980), the ICC implemented a policy which favored railroad mergers that improved efficiency and disfavored imposing conditions on a merger that might reduce potential efficiency gains. *See Lamoille Valley R.R. v. I.C.C.*, 711 F.2d 295, 301 (D.C. Cir. 1983). Not surprisingly, this coincided with the time frame of the force reductions undertaken by petitioner and its predecessors, the conduct which served as the benchmark for the $50 million punishment assessed by the jury.[17] Thus, the reductions in force which petitioner and its predecessor companies had engaged in were not only legal and legitimate outcomes of approved transactions, they were contemplated by Congress in establishing national rail policy and by the regulatory agencies in implementing congressional policy. *See Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392, 410 (5th Cir. 1980). ("The operating efficiencies created by railroad mergers often result in a loss of positions for current employees.")

Rail consolidations and force reductions have been within the purview of federal policy for 80 years, and though federal law

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[17] The force reductions for which respondent urged the jury to punish petitioner occurred primarily during the decade immediately subsequent to enactment of the Staggers Act.

does not mandate force reductions of any particular scope, holding out a lawful activity undertaken in numerous states, and fully contemplated by federal public policy makers, as the basis for calculating punitive damages in a state tort action, goes well beyond the limits of a state's authority and improperly punishes for conduct occurring in sister states, contrary to this Court's ruling in *BMW*. If it was improper for an Alabama jury to use the sales of automobiles (and the revenues derived therefrom) in other states as a calculus for punishing BMW for conduct related to sales in Alabama, it is equally impermissible for any other single state to look to force reductions occurring in numerous other states (and the savings allegedly derived therefrom) to punish CSX for an accident that occurred in a single state. Consistent with due process, if a state deems it appropriate to punish a railroad for the alleged consequences of its conduct (be it operational, personnel or other practices or decisions), as this Court has ruled, the scope of the penalty may not be based on legitimate conduct that occurred in other states.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the District Court of Appeal of Florida should be granted.

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No. 99-1987

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ANGELICA ROSE PALANK,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE FEDERAL QUESTION WAS PROPERLY RAISED AND PRESERVED.

Respondent's argument that the federal question was not properly preserved is mistaken as to both the record and Florida jurisdictional law. The claims of federal constitutional protection were repeatedly and assiduously preserved at all available levels.

A. The Trial Court.

In the trial court, petitioner repeatedly and unsuccessfully objected on federal constitutional grounds to evidence and argument presented by respondent concerning (i) lawful maintenance-of-way-personnel reductions throughout CSX's multi-state system, and (ii) cost savings resulting from such reductions. See, *e.g.*, Tr. 981-85:

> "[Counsel for petitioner]: . . . And also we have raised the Gore case, the most recent United States Supreme Court case dealing with punitive damages, which discusses there is no liability for lawful conduct, and it has a limitation to geographic area, and they are talking about a system wide situation . . . .
>
> "THE COURT: . . . [A]re you telling me that the 2.4 billion dollars was saved as a result of cutting—downsizing only maintenance people?
>
> "[Counsel for respondent]: Yes, sir. . . .
>
> "[Counsel for respondent]: That's our theory of the case. They can argue against it, and we can argue for it. . . .
>
> "THE COURT: I said you can mention the 2.4 billion . . . ."

See also, *e.g.*, Tr. 8399 ("the constitutional concerns that we brought to Your Honor's attention during our motion to strike, which the U.S. Supreme Court has said one state does not have authority to punish an individual defendant for

conduct that is lawful outside the state"), 13687 (citing *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), as basis for mistrial because of argument based on out-of-state personnel reductions). Pp. 3a-8a, *infra*. See also petitioner's Trial Memorandum, p. 11a, *infra*:

> "The due process clause is also pertinent . . . . [T]he Supreme Court's most recent pronouncement, in *BMW* v. *Gore*, sets geographic limits on punitive damages and holds that lawful conduct cannot be punished."

Petitioner also sought specific jury instructions to preclude the jury from considering lawful out-of-state conduct in setting punitive damages. See petitioner's Memorandum, pp. 14a-16a, *infra*; Proposed Jury Instructions, pp. 17a-18a, *infra* ("You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida," citing *BMW* (to the opinion's specific discussion of this issue) and *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997)). The requested instructions were denied. P. 17a, *infra*.[1]

Petitioner repeatedly invoked this Court's *BMW* opinion as precluding punishment of lawful out-of-state conduct. *BMW* cited both Due Process Clause and Commerce Clause decisions in concluding: "Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." 517 U.S. at 573. In addition to citing *BMW*, petitioner also cited the Due Process Clause, and also expressly argued, p. 16a, *infra*, that

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[1] The assertion in the Brief in Opposition that "the court rejected CSX's request as untimely," Br. Opp. 4, 10, is flatly incorrect. Respondent cites for this assertion Tr. 13843, but that is a colloquy concerning an entirely different instruction. Even as to that instruction, the trial court's ruling was not based on timeliness. See Tr. 13844, p. 9a, *infra*.

> "unless Defendant's proposed instructions are used, the punitive damages award will run afoul of the interstate commerce clause in the U.S. Constitution and principles of state sovereignty and comity, which limits a state's power to punish a defendant for conduct outside its borders."

In post-trial motions petitioner once again argued that the trial court had unconstitutionally allowed the jury to consider lawful out-of-state personnel reductions in its punitive-damage deliberations, and had allowed the jury to award punitive damages to deter lawful out-of-state conduct. Petitioner again cited *BMW*, "the Due Process Clause," and "federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation." Pp. 20a-22a, *infra*.[2]

B. The District Court of Appeal.

Petitioner renewed all its constitutional arguments on appeal to the Florida District Court of Appeal. Contrary to the implication of the Brief in Opposition, at 5, petitioner's constitutional claims were by no means confined to a single footnote. Rather, petitioner's brief devoted several pages of argument to these issues and repeatedly cited *BMW*. See pp. 23a-27a, *infra*. Petitioner unambiguously argued for reversal because the jury had not been instructed that it "should only consider Florida's interest in protecting its own citizens and

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[2] Respondent's argument, Br. Opp. 10, that the constitutional claim was waived by not presenting it until the jury instructions on punitive damages is unsupported by any authority, factually inaccurate and legally incorrect. First, the constitutional claims, as noted, had been raised throughout the trial. Second, even if they had not been, the proposed jury instructions were a timely and appropriate way to raise the federal question, as were the post-trial motions, and no Florida court held otherwise or adopted respondent's unsupported argument of waiver. Indeed, even if they had, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923); *James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984).

economy" and that it "should not award money to deter defendant's lawful conduct outside Florida's borders." *Id.*, 24a, see also *id.*, 27a ("attack of lawful conduct far outside the borders of Florida" was "in clear violation of *Gore*'s proscription"). It specified in a footnote that one of the bases for these textual arguments was federal constraints "prohibiting states from unduly burdening interstate commerce." *Id.*, 25a n.39.

C. The Florida Supreme Court.

Respondent's argument that the federal claims should have been presented to the Supreme Court of Florida, Br. Opp. 1, 6-8, rests on a misunderstanding of Florida law. Those issues were not presented to that court because it had no jurisdiction, discretionary or otherwise, to review them.

Because, as respondent acknowledges, Br. Opp. 12, the District Court of Appeal's opinion did not discuss the constitutional claims urged by petitioner, under the applicable Florida jurisdictional provisions the Florida Supreme Court could review those issues only upon certification by the District Court of Appeal that it had decided "a question . . . of great public importance." Fla. R. App. P. 9.030(a)(2)(A)(v).

Petitioner timely sought such certification of the question whether "constitutional requirements as reflected in *BMW of North America, Inc. V. Gore*, 517 U.S. 559 (1996) were violated" by allowing evidence of the system-wide personnel reductions and denying the proposed instruction prohibiting punitive damages for lawful conduct outside Florida. P. 28a, *infra*. Petitioner's motion for certification was denied without opinion. Pet. Cert. App. 17a.

Respondent is quite correct that petitioner's subsequent application to the Supreme Court of Florida for discretionary review, which was based on state-law issues as to which that court did have discretionary jurisdiction, did not include the federal constitutional claims. See Pet. Cert. 7 & n.4. But

respondent's observation is entirely irrelevant. Review of the federal claims in the Supreme Court of Florida, even discretionary review, was jurisdictionally precluded by the District Court of Appeal's denial of certification and its failure "expressly" to explain its ruling on the constitutional issues. See Fla. R. App. P. 9.030(a)(2)(A)(ii), (v); *Florida Star* v. *B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988); *Jenkins* v. *State*, 385 So. 2d 1356 (Fla. 1980).[3] Hence by seeking certification petitioner exhausted all the review of federal claims that was available in the Florida courts, and fully satisfied the jurisdictional requirements of 28 U.S.C. § 1257, as this Court has recognized in similar cases. *Cf., e.g., Ibanez* v. *Florida Dep't*, 512 U.S. 136, 142 (1994)("the District Court of Appeal . . . affirmed the Board's final order *per curiam* without opinion. . . . As a result, Ibanez had no right of review in the Florida Supreme Court"); *Palmore* v. *Sidoti*, 466 U.S. 429, 431 (1984)("The Second District Court of Appeal affirmed without opinion . . . thus denying the Florida Supreme Court jurisdiction to review the case"); see also *Florida Star, supra.*

D. Pertinent Decisions.

Respondent's argument seems to amount to a complaint that although petitioner repeatedly cited the *BMW* case, and also cited due process and Commerce Clause protections in both the trial court and the District Court of Appeal, it should have done so more often and always mentioned all three. But the long-established rule is that

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor

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[3] Fla. R. App. P. 9.030(a)(2)(A)(ii) provides for Supreme Court review of decisions that "expressly construe a provision of the state or federal constitution;" however, because (as respondent acknowledges, Br. Opp. 12) the District Court of Appeal's opinion here provided no such express construction, that section did not apply. See also *Grate* v. *State*, 750 So. 2d 625, 626 (Fla. 1999).

> be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Street v. *New York*, 394 U.S. 576, 584 (1969), quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)(footnote omitted); see also *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980); *cf. Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965)("[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected"). Indeed, given the clarity of the constitutional principle established in *BMW*, resting on requirements of both due process and the Commerce Clause, petitioner's citations to that case as prohibiting punishment of lawful extraterritorial conduct ought by themselves to have sufficed. But petitioner cited the constitutional provisions themselves as well. Moreover, this Court has explained that extraterritorial application of state impositions on interstate business may violate either Due Process Clause or Commerce Clause protections, or both, and that invoking one includes the other as well. *Braniff Airways, Inc.* v. *Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954). Similarly, this Court's discussion in *BMW* did not seek to distinguish between them. See 517 U.S. at 571-73 and cases cited; *cf. Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Petitioner's invocation of the federal constitutional protection recognized in *BMW* was unambiguous, unrelenting, and adequate.

II. CERTIORARI IS APPROPRIATE.

1. Respondent asserts that "the [out-of-state personnel] reductions were not themselves the grounds for imposition of punitive damages." Br. Opp. 11. But that assertion is utterly belied by the record. Over petitioner's repeated objections, and rejecting petitioner's proposed instructions, the jury was

permitted to make out-of-state lawful conduct the basis for the largest punitive verdict in Florida history. It was emphatically urged by respondent to do exactly that.[4] As respondent's counsel told the trial court, "That's our theory of the case. They can argue against it, and we can argue for it." P. 6a, *infra*. "This is our entire case." *Id.*, 4a.[5]

2. Respondent correctly notes that the Florida court rejected petitioner's constitutional claims "with no discussion at all." Br. Opp. 12. That has never precluded this Court's review of properly preserved Federal claims; with regularity this Court reviews even appellate decisions issued with no opinion. *E.g., Farmer v. Brennan*, 511 U.S. 825 (1994); *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989). Here, of course, the same District Court of Appeal had just

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[4] See, in addition to excerpts from respondent's argument quoted at Pet. Cert. 3-4, Tr. 13964-65:

> "So what is the proper punitive damage verdict to deter this conduct and to stop it and to have these folks say look, even though we made 2.4 billion or actually 3.3 billion as of '93. . . . What is it that's going to cause them to say that is not a good idea even though we are making these enormous profits, we have to stop that, we have to put on enough people to make this work."

Tr. 13967-68:

> "The punitive damage verdict in this case, not just from the greater weight of the evidence, but from the overwhelming clear and convincing weight of the evidence, certainly should be not—should not be less than one year's ill gotten gains, should not be less than 275 million. 275 million would be a little bit over 10 percent of the 2.4 billion dollars in ill gotten gains from '81 to '93."

[5] Respondent until now acknowledged and vigorously defended such measuring of punitive damages by petitioner's system-wide personnel reductions. *E.g.*, Plaintiffs' Response to Defendant's Memorandum Regarding Punitive Damages, Cir. Ct., at 19-21; Memorandum in Response to Memorandum Supporting Post-Trial Motions, Cir. Ct., at 38-40; Motion for Entry of Judgment, Cir. Ct., at 63-65; Answer Brief of Appellees, Dist. Ct. App., at 8, 53 & n.9; Appellees' Response to Appellant's Motion for Certification, Dist. Ct. App., at 8-10.

rejected the same federal claims with a full opinion four months earlier. *Owens-Corning Fiberglas Corp.* v. *Ballard*, 739 So. 2d 603 (Fla. App. 1998), *approved*, 749 So. 2d 483 (Fla. 1999) (cited at Pet. Cert. App. 12a). Thus it had already explained its views of *BMW*, and how federal constitutional law is to be applied in Florida.[6] There certainly is not a scintilla of support in the record for respondent's speculation that it "appears" to respondent that the court omitted discussion "probably because the issue had not been preserved." Br. Opp. 10, 12.

3. The extraterritorial personnel reductions on which respondent's punitive claim was based were not conduct unlawful in every state. In fact, respondent presented no evidence that they were unlawful in *any* state. As the *amicus* demonstrates, the operating policies of interstate railroads, including their personnel policies, are the subject of longstanding federal regulation. Far from being unlawful, the reductions implemented the Congressional decision to deregulate and enhance efficiency in the railroad industry. See AAR Br. 11-14; Pet. Cert. 14-15.

4. Respondent's suggestion that the Tenth Circuit has somehow abandoned its constitutional position in *Continental Trend Resources*, see Br. Opp. 12-13, is incorrect. The recent Tenth Circuit decision cited by respondent emphatically restates the very argument of this petition:

> "In *BMW*, the defendant was assessed punitive damages for activities in other states, which were explicitly legal in those states. By punishing behavior in other states which those states had made a legislative decision to permit, Alabama reached beyond its own zone of legitimate interests and encroached on the sovereign interests of other states."

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[6] Indeed, respondent argued to the court that "In OWENS-CORNING FIBERGLAS CORP. v. BALLARD . . . this Court answered the question for purposes of this case . . . ." Answer Brief of Appellees, Fla. Dist. Ct. App., at 53 n.9.

Smith v. *Ingersoll-Rand Co.*, 214 F.3d 1235, 1253 (10th Cir. 2000). *Smith* involved *unlawful* conduct in other states, admissible *only* for the limited purpose of proving notice and reprehensibility.[7]

5. None of the cases respondent cites supports the Florida holding of punishment for lawful extraterritorial conduct. *Ex parte LifeUSA Ins. Co.*, 2000 Ala. Lexis 159 (Ala. 2000), addressed simply discovery issues as to unlawful conduct in another state relevant to reprehensibility; *cf. Schaffer* v. *Edward D. Jones & Co.*, 552 N.W.2d 801, 813 n.19 (S.D. 1996)(out-of-state conduct admissible as to reprehensibility). *Walston* v. *Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996), also concerned plainly unlawful conduct, as did *Owens-Corning* v. *Thompson*, 2000 WL 764930 (Tex. App. 2000) (unlawful conduct in other states admissible because plaintiff worked there).[8]

6. Respondent's argument that the conflict should be ignored because this decision was not issued by the Supreme Court of Florida, Br. Opp. 12, ignores that court's *Owens-Corning* decision. The dissenting Justice in that case pointed out that "[t]he punitive damage issues in this case are significant and have major public policy ramifications," and concluded that "[w]e have no more authority to impose punitive damages in this case than we have to impose a criminal sentence for a crime that occurred in the state of

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[7] Moreover, this Court has specifically noted as an open question "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State." *BMW* v. *Gore*, 517 U.S. at 573 n.20 (emphasis in original).

[8] See also *Jimenez* v. *Chrysler Corp.*, 74 F. Supp. 2d 548, 582 (D.S.C. 1999) ("Chrysler's conduct would be considered unlawful under the products liability law of every state"). In two of the cases cited by respondent, no evidence of out-of-state conduct had been admitted at trial. See *Parsons* v. *First Investors Corp.*, 122 F.3d 525, 531 n.2 (8th Cir. 1997); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1131 (9th Cir. 1997).

Georgia." *Owens-Corning Fiberglas Corp.* v. *Ballard*, 749 So. 2d 483, 489-90 (Fla. (1999) (Overton, J., dissenting). Moreover, the Supreme Court of Florida itself has explained the limited nature of its jurisdiction, and that "under the constitutional plan" of Florida's revised constitution, "[i]t was never intended that the district courts of appeal should be intermediate courts." *Sanchez* v. *Wimpey*, 409 So. 2d 20, 21 (Fla. 1982); see also *Owens-Corning*, *supra*, 749 So. 2d at 485 n.3 ("we would discourage district courts from asking for this kind of check on its decision" by certification). And this Court with great frequency reviews decisions of state intermediate appellate courts.

7. Even if there were no conflict in the lower courts, it is plain that this Florida decision flatly violates this Court's clear command in *BMW* v. *Gore*. This is the second recent Florida decision to do so, and imposes an immense punishment on an interstate railroad for lawful extraterritorial conduct. It is significant to the national economy and utterly at variance with decisions of this Court going back at least to *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). That is reason enough to grant certiorari.

CONCLUSION

For the reasons stated herein and previously, certiorari should be granted.

Respectfully submitted,

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August 23, 2000

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ADDENDA

ADDENDUM A

Florida Rule of Appellate Procedure 9.030 provides in relevant part (footnotes omitted):

Rule 9.030. Jurisdiction of Courts

(a) Jurisdiction of Supreme Court.

(1) *Appeal Jurisdiction.*

(A) The supreme court shall review, by appeal

(i) final orders of courts imposing sentences of death;

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(B) If provided by general law, the supreme court shall review

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the supreme court may be sought to review

(A) decisions of district courts of appeal that

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the supreme court, and

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States court of appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.

(3) *Original Jurisdiction.* The supreme court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction, and may issue writs of mandamus and quo warranto to state officers and state agencies. The supreme court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

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ADDENDUM B

IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL
CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

Case No. 92-22407 13

ANGELICA ROSE PALANK, as Personal Representative of the Estate of PAUL JOSEPH PALANK, Deceased; and surviving spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor,

Plaintiffs,

vs.

CSX TRANSPORTATION, INC., a Foreign Corporation,

Defendant.

Hollywood, Florida

Transcript of Trial Proceedings

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* * *

[981] MR. JAMES [Counsel for petitioner]: The next point is the alleged 2.4 billion dollar savings. You did indicate a factual, and again I think it was the context of this, there would need to be factual predicates relative to this testimony. Our point is to get these figures in front of a jury in the liability phase of this bifurcated procedure would be

reversible error under the Grace case, because it still touches on the wealth of the parties. We could make a stipulation to the effect that one of the motives of downsizing was to save money, and certainly there we wouldn't have the problem of unfair prejudice outweighing probative value.

As the cases I gave you say, the Court should be more restrictive when in these questionable type areas on statements and things, it's better to err on the side of a greater restriction than too little. And also we have raised the Gore case, the most recent United States Supreme Court case dealing with punitive damages, which discusses there is no liability for lawful conduct, and it has a limitation to geographic area, and they are talking about a [982] system wide situation.

Finally, there is no link, and as the Court will recall from the chart we had before, to link this alleged saving to this accident and this switch and, in fact, as we showed you the facts are, this switch had quite a few inspections right up until 24 hours before the accident.

THE COURT: You told me you had more inspections.

MR. JAMES: I told you, I know, but my point is I made about six points why we don't believe that it's appropriate or proper for them to be mentioning this in the opening statement. This was just what we had done to assist the Court.

THE COURT: All right. Who wants to answer that?

MR. SEARCY [Counsel for respondent]: May I be heard on that, Your Honor?

THE COURT: Yes, sir.

MR. SEARCY: As the Court stated when this matter came up a couple of weeks ago, this is an issue for the jury. This is our entire case. It's based on the motive for the improper conduct. CSXT was saving enormous amounts of money by laying off maintenance of way employees [983] who were not revenue producers, they were not producing any revenue, they laid them off for costs. They made tremendous savings

by doing so. The savings were so great they more than paid for all the derailments, that ensured they more than paid for any claims or fines, they had a tremendous financial motive to do this.

The FRA did an audit of one of their divisions, the Baltimore division in 1987, and the finding of that audit was they did not have enough maintenance of way personnel to do the minimal safety inspections and maintenance required, and they made recommendations to CSXT that they put on more maintenance of way personnel to do this. That's in 1987 they are on notice of that, this happens in 1991.

The only way that the jury is going to be able to believe this conduct that is so deplorable is to understand the motive and the motive was to cut back on employees—

THE COURT: Mr. Searcy, are you telling me that the 2.4 billion dollars was saved as a result of cutting—downsizing only maintenance people?

MR. SEARCY: Yes, sir, and that's testified [984] to by Leland Case, transportation economist. He has a Ph.D. from Northwestern. He worked with the American Association of Railroads for ten years, and he has gone through the R-1's, which is the financial reporting

THE COURT: You are saying—

MR. SEARCY: Only on maintenance of way cutbacks.

THE COURT: You are saying something else there, you are saying the money they save well pays for the damages and all that stuff. How can you say that?

Let's assume, God forbid, there was a horrible accident and one thousand people were not killed but injured very badly. That's a big swallow. I don't know I am going to let you say that in opening statement.

MR. SEARCY: Doesn't that go to the weight?

THE COURT: Who says that?

MR. SEARCY: That's our argument.

THE COURT: You are wrong there because it's argument.

MR. SEARCY: That's our theory of the case. They can argue against it, and we can argue for it. If we were limited on opening statement to [985] what they admitted, we wouldn't be able to give an opening statement.

THE COURT: That sounds like argument to me.

MR. SEARCY: I don't intend to make any argument, but we do need to present our theory of the case, Your Honor.

THE COURT: You do. You say they saved 2.4 billion, I may allow that, but you better tie that up because if you don't, you will be in trouble.

MR. SEARCY: There was mention of the Gore case, that has nothing to do with this case, that was a case involving sales—

THE COURT: I said you can mention the 2.4 billion, but I don't think I am going to allow you to say that the money they saved they were so cavalier that they knew it would cover—unless you have somebody to say that, and I don't think you do, that's argument, that's the end of that issue.

MR. JAMES: We—note our exception on that, and I have Grace—

THE COURT: As far as the instructions, I generally, not generally, I assiduously follow the standards. I don't go past the standards [986] unless there is a real reason for it. I haven't read the standards, but if the standards cover it, I'm not going to give in addition outside the standards, that's my general policy.

* * *

[8398] MR. BALLAINE [Counsel for petitioner]:—they put on a witness who has obviously testified for a couple of days and was cross examined at length. You will recall we actually did move to strike after, and Your Honor denied that motion. But I think that's important context because before you go into these individual questions, we ask Your Honor to consider again our position that his testimony in that deposition is irrelevant or at least highly prejudicial and subject to exclusion under 403, [8399] and raises the

constitutional concerns that we brought to Your Honor's attention during our motion to strike, which the U.S. Supreme Court has said one state does not have authority to punish an individual defendant for conduct that is lawful outside the state.

With that background, I just want to remind Your Honor of what we are talking about here with this testimony. The entire purport of Mr. Case's testimony is 2.4 billion dollars of savings from CSX or predecessors from 1981 through 1993, from cutbacks. On its face obviously cutbacks are perfectly lawful. Their position is cutbacks are not perfectly lawful if what you are doing is throwing safety to the wind as a result. All this case is about, and the only evidence that's at all relevant to this jury is were there cutbacks that affected safety in the Florence division, that's all we are talking about.

But we know from Mr. Case's testimony from the first time, that his 2.4 billion does not concern cutbacks that necessarily have anything to do with the Florence division. Your Honor will recall that his own testimony was under cross-examination which they don't want to put in [8400] now that, in fact, CSX only was created in about 1986. And so in order to get figures from before 1986, he basically traced back to every corporation, railroad corporation that, that existed from 1981 on that ultimately became part of the CSX family of corporations. And those individual railroads included lots of companies that had nothing to do with the Florence division whatsoever at anytime. And if there was a cutback by that railroad, it couldn't possibly have anything to do with what's going on here.

Mr. Case also made clear that even when we are talking about the 2.4 billion dollars, we are not even talking about real money. Your Honor will recall he felt like it was important to adjust the money to 1987 dollars. I can't imagine why that would be relevant. If nothing else, their argument ought to be here is actually how many dollars were actually saved, but that's not how they put on their case.

* * *

[13687] THE COURT: Motion for mistrial denied.

MR. FLEMING [Counsel for petitioner]: For the record, I may not have made it clear when I referenced the Gore case, that talks about wrong to persons outside of the state, in this case Florida. Certainly the ones Mr. Searcy referred to, even the ones involved in this accident, many of which were actually located outside the state of Florida, it's clearly improper argument. I know he read the case.

MR. SEARCY: I have read it, but I'm not sure you have. Gore has nothing to do with that. Gore was a case against the Volkswagen—or BMW people. They had cars that they would dent before they sold new and fix them and repaint [13688] them and sell them new and not tell anybody it was dented and repainted. And this dentist found out and sued for punitive damages in Alabama, and there were some states that had a statute that specifically allowed the automotive plaintiff to do that as long as the damage was below a specific amount. And so they said it's not proper to argue all 50 states on the amount of damages on this punitive damage for violation of this statute when some of those 50 states specifically allowed the conduct.

That's got absolutely nothing to do with this case. My arguments on this case, Your Honor, were appropriate with regard to other individuals. They brought up look at all the other people that were hurt and they all had lawsuits, and maybe they got six million dollars.

THE COURT: All right. All right. All right. Enough. Come on, let's go home. I will see you all Monday at 11:00.

* * *

[13842] THE COURT: Relative to the instructions.

MR. SEARCY: The Defendants submitted.

MR. BARNHART [Counsel for respondent]: We—I have them, we object to them.

THE COURT: How about the one that they asked for clear and convincing evidence, that's the one you wanted.

MR. BARNHART: I didn't see their jury instruction form. Which one is that, Bill?

MR. BALLAINE: Obviously all we are doing is protecting the entire record that the entire case was supposed to be submitted on clear and convincing evidence.

MR. BARNHART: We just got it.

THE COURT: I just got them, too, and I read them. I don't understand. [13843]

MR. BALLAINE: So the record is clear, we didn't mean to suggest the jury should have a clear and convincing standard for this phase. We want to make sure the record was clear from the outset we thought the clear and convincing should go to the jury.

MR. BARNHART: We may go along with clear and convincing at this stage going to the jury.

MR. BALLAINE: We object to the special interrogatories.

THE COURT: You object to that. You withdraw this instruction first, you give me an instruction to give to the jury.

MR. BALLAINE: All we are doing—the instruction we gave you greater weight of the evidence because we acknowledged that is what the patterned jury instructions requires. All we want to do is protect our position, which has indicated Your Honor from the outset that—

THE COURT: You want clear and convincing evidence in phase one, you don't want it just for phase two.

MR. BALLAINE: Absolutely not.

THE COURT: This instruction you gave me for phase two really doesn't apply to phase two. [13844]

MR. BALLAINE: That's correct, per se.

THE COURT: Enough, enough. You are not getting it, so don't worry about it.

* * *

ADDENDUM C

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed Feb. 11, 1997]

DEFENDANT'S TRIAL MEMORANDUM
REGARDING PUNITIVE DAMAGES

Defendant CSX TRANSPORTATION, INC. ("CSXT"), files this memorandum to assist the Court in adjudicating the substantive and evidentiary issues presented in this trial as to whether plaintiffs are entitled to recover punitive damages against CSXT.

* * *

[10] a. *Evidence of Pre-Accident Conduct*

The standard for considering evidence in the punishment phase is defined in Florida law as being the potential for harm, by a measure of probability, rather than a hindsight analysis based on actual harm.

> The seriousness of the *probable result* of the defendant's conduct, then, is the yardstick for determining the advisability of discouraging such behavior in the future, rather than the seriousness of the damage actually caused.

Levine v. Knowles, 197 So.2d 329, 331 (Fla. 3d DCA 1967).

In the entitlement phase, plaintiffs must prove evil intent and evil conduct that proximately caused the plaintiffs' damages. Temporally, the conduct at issue necessarily predates the injury, because the jury is considering whether to punish CSXT for allowing the accident to happen. The nature of the conduct that is admissible is what (a) can be

shown to be linked to the accident and (b) has a factual component -- not mere argument -- of wrongdoing rising to the manslaughter standard. As to what type of conduct is relevant, a key evidentiary ruling relates to plaintiffs' "motive" argument, by which they intend to admit evidence at [*sic*] the cost-savings realized by CSXT, across the board, in a decade of reductions in force and increased mechanizations. *BMW v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996) holds that lawful conduct, and conduct unrelated to the place of injury, are not properly considered in assessing punitive damages. Of course, unless and until any amount of punitive damages is being assessed, evidence of any party's wealth is inadmissible. Evidence that CSXT reaped billions of dollars in savings is not only irrelevant and prejudicial, but runs afoul of *BMW v. Gore* and *W.R. Grace*'s expressed policy.

* * *

[20] *CONSTITUTIONAL IMPLICATIONS OF PUNITIVE DAMAGES*

Punitive damages awards and federal constitutional issues are most closely associated in the realm of excessiveness; i.e., whether awards of certain magnitude violate the due process clause of the fourteenth amendment. The due process clause is also pertinent to the liability phase of this trial, however, insofar as fundamental fairness is at stake. As noted above, the Supreme Court's most recent pronouncement, in *BMW v. Gore*, sets geographic limits on punitive damages and holds that lawful conduct cannot be punished. To the extent plaintiffs seek to hold CSXT liable for lawful business decisions, serious due process objections arise.

The United States Supreme Court has, on three different occasions, reviewed punitive damages awards. In *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991) the court reviewed an Alabama punitive damages

award, in an amount approximately four times the amount of compensatory damages, which was asserted to be so excessive as to violate due process. Alabama provided for post-verdict "reasonableness" review by the trial and appellate courts. The court affirmed the award, holding that review for reasonableness, together with adequate guidance by the court when the case is tried to the jury, were sufficient to make the proceeding fundamentally fair. In terms of substantive due process, a 4-to-1 ratio was close to the line but did not cross the line into constitutional impropriety.

In a second case, *TKO* [*sic*] *Production Corp. v. Alliance Resources Group*, 509 U.S. 443, 113 S.Ct. 2711 (1993), the court also acknowledged a constitutional right to be free of excessive [21] punitive damages awards; however, it declined to formulate a test to determine excessiveness. Presumably persuaded by the evidence of intentionally mean-spirited and harmful conduct, a plurality of the court held that the $10 million award—against a potential harm to plaintiff estimated at $1 milliondid not "jar one's constitutional sensibilities."

The court finally implemented the acknowledged right to be free of a grossly excessive punitive damages award in *BMW v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996). BMW had been found liable for $4 million in punitive damages for its policy of not disclosing presale repairs to its vehicles which did not exceed three percent of the sales price. The jury awarded the single plaintiff in the case $4,000 in compensatory damages. The majority opinion makes several important contributions to the law on punitive damages. It held that such awards must be keyed to an identified interest at the forum state, an[d] a defendant cannot be punished for conduct that does not offend those interests. Moreover, a defendant cannot be punished for lawful conduct. Assessing the award against these standards, it was found grossly excessive and violative of due process. The court set three "guideposts" for lower courts assessing reasonableness: (1)

the degree of reprehensibility of the misconduct; (2) the disparity between the harm or potential harm to plaintiff and the award; and (3) the difference between this remedy and civil penalties imposed in comparable cases. These guideposts are an admonition to trial courts to scrutinize punitive damages.

* * *

ADDENDUM D

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed July 29, 1997]

DEFENDANT CSX TRANSPORTATION, INC.'S MEMORANDUM IN CONNECTION WITH ITS SUBMISSION OF JURY INSTRUCTIONS AND PROPOSED SPECIAL VERDICT FORM FOR STAGE TWO OF PUNITIVE DAMAGE TRIAL

Defendant, CSX TRANSPORTATION, INC. ("CSXT"), respectfully submits this Memorandum of Law in Connection With its Submission of Jury Instructions and Proposed Special Verdict Form for Stage Two of Punitive Damage Trial.

[2] *Introduction*

This memorandum is respectfully submitted to briefly address certain constitutional issues relevant to the Court's consideration of what jury instructions and verdict form should be given to the jury at the end of stage two of this punitive damage trial.[1]

Constitutional Concerns
Relevant To Stage Two

Federal and state courts have repeatedly had occasion in recent years to address the many constitutional implications of a punitive damage claim. *See, e.g., Honda v. Oberg*, 512 U.S. 124, 129 (1994)(punitive damages is an exercise of state power that must comply with due process); *BMW of North*

[1] Defendant respectfully refers the Court to its prior submission addressing, among other things, constitutional concerns specifically applicable to stage one.

America v. Gore, 116 S.Ct. 1589 (1996) (addressing due process constraints on a state court punitive damage verdict); *TXO Production Corp. v. Alliance Resources, Inc.*, 509 U.S. 443 (1993) (reaffirming existence of substantive due process protection against excessive punitive damages); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (focusing on procedural due process issues in the face of vague jury instructions); *Browning Ferris Indus. of Vermont v. Kelco Disposal Co.*, 492 U.S. 1 (1989)(discussing punitive damage awards in context of Eighth Amendment (excessive fines clause) and the Fifth and Fourteenth Amendments (due process clauses)); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1995) (discussing due process considerations in punitive damage cases, including a defendant's [3] right to reasonably-articulated legal standards); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996) (addressing implication of due process clause and interstate commerce clause). *See also BMW of North America v. Gore* 116 S.Ct. at 1607 (Breyer, J. concurring) (addressing equal protection implications of any state law that provides "an open-ended basis for inflating the award when the defendant is wealthy," but not against less pecunious defendants); *TXO Prod. Corp.*, 509 U.S. at 472-501, (O'Connor, J., dissenting)(questioning verdict where defendant's great wealth stressed).

Particularly, given the understandably strong emotional sympathies favoring Plaintiffs and the evidence admitted, over objection, concerning Defendant's enormous size and financial resources and its purported "system-wide" wrongs, reaching far beyond the immediate issues concerning the defective switchstand, and the fact that the jury will hear about Defendant's multi-billion dollar net worth, but not be told that Amtrak, rather than CSX Transportation Inc., will bear the financial brunt of the jury's "punishment," this case raises grave implications under both the United States and

Florida Constitutions.[2] Defendant submits that if this Court permits the jury to be charged pursuant to the Florida's Standard Jury Instructions covering stage two of a bifurcated trial, without giving the additional instructions and the special verdict form being submitted by Defendant, any resulting punitive damage award would violate the Fifth and Sixth Amendments, as well as the Due Process and Equal Protection Clauses of the Fourteenth [4] Amendment of the United States Constitution, because, among other things, the Plaintiffs would be allowed to secure a substantive punitive damage award against a large corporation based on constitutionally inadequate standards; and it would violate the excessive fines clause of the Eighth Amendment to the United States Constitution in that any award of such damages, without proper standards, would constitute an imposition of excessive and unreasonable fines. And for much the same reasons, the award of punitive damages would violate substantially similar provisions in the Florida Constitution, specifically Article I, Section 2 (Basic Rights), Article I, Section 9 (Due Process), Article I, Section 17 (Excessive Punishments), and Article I, Section 21 (Access to Courts) of the Florida Constitution. Finally, unless Defendant's proposed instructions are used, the punitive damages award will run afoul of the interstate commerce clause in the U.S. Constitution and principles of state sovereignty and comity, which limits a state's power to punish a defendant for conduct outside its borders. *See, e.g., BMW of North America v. Gore*, 116 S.Ct. at 1597-1598; *Continental Trend v. OXY USA, Inc.*, 101 F.3d at 637-638.

* * *

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[2] Constitutional provisions implicated include the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 2 (Basic Rights), Article I, Section 9 (Due Process), Article I, Section 17 (Excessive Punishments), and Article I, Section 21 (Access to Courts) of the Floriida Constitution.

ADDENDUM E

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed July 29, 1997]

Court Exhibit No. 15
Denied by Court

DEFENDANT'S NOTICE OF FILING OF PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM FOR SECOND STAGE OF BIFURCATED TRIAL OF PUNITIVE DAMAGES

Without waiving its rights, Defendant, CSX TRANSPORTATION, INC., hereby gives notice of filing proposed jury instructions and a special verdict form for the second stage of the bifurcated trial of Plaintiffs' punitive damage claim (the "Instructions").

* * *

NO. 8
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

In considering what amount to award as punitive damages, you should restrict your consideration to Florida's interest in protecting its own citizens and its own economy.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F. 3d 634, 637 (10th Cir. 1996)

* * *

NO. 9
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in lawful conduct that takes place in states outside the State of Florida.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 and 1598 n.20 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634, 637 (10th Cir. 1996)

NO. 10
CONDUCT OUTSIDE STATE
SPECIAL INSTRUCTION

You may not impose punitive damages against Defendant for the purpose of deterring Defendant in the future from engaging in conduct, whether it be lawful or unlawful, that takes place in states outside the State of Florida.

Authorities:

BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1597 and 1598 n. 20 (1996)

Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F. 3d 634, 637 (10th Cir. 1996)

* * *

ADDENDUM F

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

[Title Omitted in Printing]

[Filed Aug. 26, 1997]

CORRECTED

DEFENDANT, CSX TRANSPORTATION, INC.'S MEMORANDUM SUPPORTING ITS MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT REMITTITUR AND NEW TRIAL AND OPPOSING PLAINTIFF'S MOTION FOR JUDGMENT EXCEEDING FLORIDA'S STATUTORY CAP ON PUNITIVE DAMAGES

* * *

[29] 3. *Constitutional Constraints*

The Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits a state from imposing a grossly excessive punishment on a tortfeasor and thus fixes a substantive limit on the sustainable size of a punitive damage award. *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1592 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189 (Fla. 3d DCA 1997).[33]

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[33] This discussion focuses on the United States Constitution but defendant has contended that analogous provisions in the Florida Constitution are equally applicable. *See, e.g., Langmead*, 1997 WL 244910. CSXT also contends that the Eighth Amendment, like the Due Process Clause, similarly requires rejection of the $50 million punitive damage award in this case. *See, Browning v.* [*sic*] *Ferris Ind. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (and dissenting opinion of Justice O'Connor at 492 U.S. at 282-300).

Given the merits of CSXT's statutory and common law rights to a substantial remittitur, plaintiffs' superficial analysis of the implications of Supreme Court case law requires only a relatively brief response.

Under *Gore*, 116 S. Ct. 1589, the Supreme Court recently established three guideposts for assessing whether an award is constitutionally excessive under the Due Process Clause: (1) degree of reprehensibility of the conduct; (2) ratio of punitive damages to compensatory damages; and (3) the difference between the civil punitive damage remedy and any available civil penalties. *Gore*, 116 S. Ct. at 1598-1599. But the Supreme Court did more. *Gore* also instructed that the state may only consider that state's interest in protecting its own citizens and its own economy, rather than purporting to act for citizens (or in this case, the travelling public) anywhere in the United States. *Gore*, 116 S. Ct. at 1597. *Gore* further directed that a state cannot impose punitive damages to deter lawful conduct outside that state, and indeed, *Gore* has [30] since been read to prohibit a state punitive damage award intended to inhibit *unlawful* conduct outside the state's own borders. *Gore*, 116 S. Ct. at 1597; *Continental Trend Resources, Inc.*, 101 F.3d 634, 636-637 (10th Cir. 1996)(citing *Gore*, 116 S. Ct. at 1598 n.20 and n.21). *Gore* further warned that a defendant's wealth does not alone justify a large punishment by a state, or any punishment at all, particularly where the defendant is an active participant in the national economy. *Gore*, 116 S. Ct. at 1594. *See Continental Trend*, 101 F.3d at 641. And *Gore* stressed that the most important factor in determining an appropriate award is the degree of reprehensibility of the defendant's conduct. *Gore*, 116 S. Ct. at 1599.[34]

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[34] CSXT submitted proposed jury instructions for phase two of the trial covering each of the *Gore* directives discussed above. All were rejected by this court.

The $50 million award was plainly influenced by plaintiffs' unfounded charges that a $5 billion railroad, operating throughout the East Cost, had to be punished and deterred because of "wrongful" cutbacks throughout its system, which had supposedly yielded $2.4 billion in "ill-gotten gains." *See* Appendix B. Personnel cutbacks by CSXT and its predecessors over an entire decade in states up and down the Eastern seaboard went far beyond Florida's legitimate interests in this case. Yet these cutbacks became the excuse for plaintiffs to urge the jury to award a wildly-excessive $275 to 550 million, resulting in the jury's compromise figure of "only" $50 million. To permit such an inflated verdict to stand would totally ignore the teaching of *Gore*.

* * *

[44] Similarly, it was error to limit the jury in phase two to the brief, vague legal guidance contained in the standard instructions. The jury also should have been instructed, as defendant requested, that punitive damages cannot be awarded to give plaintiffs additional damages; that the jury should only consider Florida's interest in protecting its *own* citizens and economy (not the travelling public anywhere); that the jury should not award money to deter future conduct, whether lawful *or* unlawful, outside is borders; and that a defendant's wealth does not justify a large punishment, or indeed, any punishment at all. All these requested instructions were consistent with the dictates of *Gore*, 116 S. Ct. at 1597-1604, and necessary given the evidence and plaintiffs' arguments to the jury. *See also Continental Trend*, 101 F.3d at 636-637, 641. Indeed, the jury also should have received further guidance—requested by defendant—on what specific factors to consider in determining an amount to award, so that the jury would properly understand that wealth *is not* an important factor and that, instead, the jury needed to focus on [45] the existence or degree of reprehensible misconduct *beyond* that which minimally justifies a punitive

damage award—*i.e.*, conduct such as malice or willful misconduct causing injuries over a protracted period of time. *See, e.g., Gore*, 116 S. Ct. at 1599-1604; *Mattison*, 947 F.2d at 110. *See also, Arab Termite & Pest Control of Fla., Inc.*, 409 So. 2d at 1043; *St. Regis Paper Co.*, 428 So. 2d at 246 and 248; *Bankers Multiple Line Ins. Co.*, 464 So. 2d at 533. Instead, however, the jury was left to fend for itself under standard instructions that were far too cryptic and vague to meet the important task at hand. *Compare Standard Jury Instructions*, 689 So. 2d 1042 (Florida's standard punitive damage instructions) *with Mattison*, 947 F.2d at 109-110 (setting forth required jury instructions concerning the amount to award).[46] The court's decision to adhere to the inadequate standard instructions, and go no further, was prejudicial error.

* * *

[46] Defendant contends that the failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 116 S.Ct. at 1604.

ADDENDUM G

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

DISTRICT COURT OF APPEAL CASE NO. 97-3798

CSX TRANSPORTATION, INC.,
Appellant,

vs.

ANGELICA ROSE PALANK, as personal representative of the Estate of PAUL JOSEPH PALANK Deceased; and Surviving Spouse of PAUL JOSEPH PALANK, Deceased; and as mother, natural guardian and next friend of TAYLOR ROSE PALANK, a minor, and JOSEF PAUL PALANK, a minor.
Appellees.

[Filed June 29, 1998]

INITIAL BRIEF OF APPELLANT

* * *

[23] At the conclusion of both the liability and damages phases, the court again ignored its judicial responsibilities by refusing to give needed special instructions to the jury and by insisting that standard form instructions were basically all that was needed. When plaintiff suggested to the jury in argument that gross negligence would provide a sufficient basis for punitive damage liability—contrary to clear Florida law—the court refused to do anything about it. Then, in the damage phase, the court refused to give instructions incorporating the U.S. Supreme Court's holdings in *BMW of North America Inc. v. Gore*, 517 U.S. 559 (1996). That omission allowed the

jury to punish CSXT for lawful conduct in other states as to which Florida has no legitimate regulatory interest, in clear contravention of *Gore*.

* * *

[33] Moreover, there was no evidence that there was anything remotely unlawful about the manpower reductions made by railroads across the Eastern seaboard throughout the 1980's. To make this conduct the prime justification for demanding huge punitive damages from CSXT, therefore, violates the teaching of *Gore*, in which the U.S. Supreme Court instructed that constitutional restraints prohibit one state from imposing punitive damages in order to deter a defendant from engaging in lawful conduct in other states. *Gore*, 517 U.S. at 572-74.

By erroneously allowing plaintiff to go forward with this terribly prejudicial and (at best) misleading proof, the trial court allowed plaintiff's counsel to poison the jury's consideration of the liability issues. The liability trial should not have been about a purported $2.4 billion in "savings" or "profit," about CSXT's size or wealth, or about punishing big businesses. Yet plaintiff was improperly allowed to taint the trial with this evidence and argument.

* * *

[42] Finally, it was error to limit the jury in the damage phase to the legal guidance contained in the Standard Jury Instructions. The jury also should have been instructed as defendant requested (*see* CX15), that (1) punitive damages are not intended to give plaintiffs extra damages; (2) the jury should only consider Florida's interest in protecting its own citizens and economy; (3) the jury should not award money to deter defendant's lawful conduct outside Florida's borders; (4) a defendant's wealth does not justify a large punishment, or any punishment at all; and (5) conduct reprehensible enough to give rise to tort liability, even to a modest punitive

damage award, does not establish the high degree of culpability that warrants a substantial punitive damage award. All these requested instructions were consistent with the dictates of *Gore*, 517 U.S. at 571-586, and necessary given the evidence and plaintiffs' arguments to the jury. *See also Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 636-637, 641 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997). The jury also should have received further guidance (as defendant requested) on what specific factors to consider in determining an amount to award, so that the jury would properly focus, not on defendant's wealth, but whether CSXT's misconduct went well *beyond* that which minimally justifies a punitive damage award, *i.e.*, conduct such as malice or willful misconduct causing injuries over a protracted period of time. *See, e.g., Gore*, 517 U.S. at 576-586; *Mattison*, 947 F.2d at 110. *See also, Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982), *rev. denied*, 434 So. 2d 887 (Fla. [43] 1983); *St. Regis Paper Co. v. Watson*, 428 So. 2d 243, 246, 248 (Fla. 1983); *Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533 (Fla. 1985).

Instead, the jury was left to fend for itself under standard instructions that were not sufficiently illuminating to meet the important task at hand. *Compare Standard Jury Instructions*, 689 So. 2d 1042 (Florida's standard punitive damage instructions) *with Mattison*, 947 F.2d at 109-110 (setting forth required jury instructions concerning the amount to award).[39]

* * *

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[39] The failure to give the additional requested instructions violated not only Due Process, but also defendant's Equal Protection rights under the United States Constitution. *See, e.g., Mattison*, 947 F.2d at 101 n.3. The jury verdict also offended federal interests in prohibiting states from unduly burdening interstate commerce and imposing the state's regulatory policies on the nation. *See Gore*, 517 U.S. at 585.

[48] *Constitutional Constraints*

The Due Process clause of the Fourteenth Amendment to the United States Constitution prohibits a state from imposing a grossly excessive punishment on a tort feasor and thus fixes a substantive limit on the sustainable size of a punitive damage award. *Gore*, 517 U.S. at 562; *Honda Motor Co.*, 512 U.S. at 420; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993); *Langmead v. Admiral Cruises, Inc.*, 696 So. 2d 1189, 1191 (Fla. 3d DCA 1997).[45] Given the merits of CSXT's statutory and common law rights to a substantial remittitur, plaintiffs' $50 million must be remitted under § 768.73, *Fla. Stat.*, or run afoul of constitutional restraints.

Under *Gore*, the United States Supreme Court established three guideposts for assessing whether an award is constitutionally excessive under the Due Process Clause: (1) degree of reprehensibility of the conduct; (2) ratio of punitive damages to compensatory damages; and (3) the difference between the civil punitive damage remedy and any available civil penalties. *Gore*, 517 U.S. at 575. The Supreme Court also limited a state to consider that state's interest in protecting its own citizens and its own economy, rather than purporting to act for citizens, or in this case, the traveling public, anywhere in the United States. *See Gore*, 517 U.S. at 571-73. The Supreme Court further prohibited a state from imposing punitive damages to deter lawful conduct outside that state. *See Gore*, 517 U.S. at 572-73. *Gore* further

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[45] This discussion focuses on the Untied States Constitution but defendant submits that analogous provisions in the Florida Constitution are equally applicable. *See, e.g., Langmead*, 696 So. 2d at 1191. CSXT also contends that the Eighth Amendment, like the Due Process Clause and Equal Protection Clause, similarly requires rejection of the $50 million punitive damage award in this case. *See Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)(and dissenting opinion of Justice O'Connor at 492 U.S. at 282-300).

warned that a defendant's wealth does not alone justify a large punishment by a state, or any punishment at all, particularly where the defendant is an active participant in the national economy. *See Gore*, 517 U.S. at 585. *See also Continental Trend*, 101 F.3d at 641. Moreover, *Gore* stressed that [49] the most important factor in determining an appropriate award is the degree of reprehensibility of the defendant's conduct. *See Gore*, 517 U.S. at 575.[46]

The $50 million award was plainly influenced by plaintiffs' completely unfounded charge that at least $2.4 billion had flowed into CSXT's coffers at the expense of public safety. All plaintiff actually showed was that CSXT and many other railroads had made personnel cutbacks in their operations over the course of many years, beginning in 1981, *not* that all of these cutbacks had an adverse effect on safety over that protracted period of time. Plaintiff's case thus relied on an attack of lawful conduct far outside the borders of Florida and far beyond Florida's legitimate interests in *this* case—in clear violation of *Gore*'s proscription.

* * *

[46] CSXT submitted proposed jury instructions for the damage phase covering each of the *Gore* directives discussed above. (CX15) All were rejected by the trial court.

ADDENDUM H

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
FOURTH DISTRICT

[Title Omitted in Printing]

[Filed Sept. 9, 1999]

APPELLANT'S MOTION FOR CERTIFICATION

Appellant CSX Transportation, Inc. ("appellant" or "CSXT") respectfully moves for an order certifying that there are questions of great public importance that should be passed upon by the Florida Supreme Court. In support of the motion the appellant states:

* * *

[7] 12. Finally, this Court should certify as of great public importance the following constitutional issue:

> Whether a new trial is required on the grounds that constitutional requirements as reflected in *BMW of North America, Inc. V. Gore*, 517 U.S. 559 (1996) were violated when appellees introduced evidence in the liability phase of $2.4 billion in savings by CSXT based on a system-wide reduction in maintenance-of-way employees by CSXT, and its predecessors (*i.e.*, across the Eastern Seaboard), and when the trial court refused to instruct the jury in the damage phase that punitive damages should not be awarded to deter lawful conduct outside Florida's borders, and the jury should only consider Florida's interest in protecting its own citizens and economy, as well as that a defendant may not be punished solely for its wealth.

13. *Gore* clearly instructs that a state may not assess punitive damages to punish lawful conduct outside its borders. *Gore*, 517 U.S. at 572-74, 585. Nonetheless,

plaintiff was permitted to "prove" CSXT's liability for punitive damages through evidence attacking corporate down-sizing conduct taken by CSXT and its predecessor railroads all across the Eastern Seaboard, which allegedly yielded $2.4 billion in "savings" (described by plaintiffs' counsel to the jury as "ill-gotten gains"). Plaintiff did not (and could not) provide any evidence that this alleged "system-wide" conduct was illegal or tortious, let alone that it [8] adversely affected Florida interests. This highly prejudicial trial court ruling, and the plaintiffs' extravagant use of the ruling in phase one, violated the letter and spirit of *Gore*.

14. *Gore* also articulates basic constitutional constraints that should guide a state in assessing the amount to award for conduct warranting punitive damages. *Gore*, 517 U.S. at 572-85. Having violated *Gore* in the liability phase, the trial court compounded its *Gore* violation in the damages phase, by refusing to instruct the jury not to punish CSXT for lawful out-of-state conduct, and to consider only Florida's interests, as well as not to assess punitive damages based solely on corporate wealth. The court's failure to so instruct the jury this way was constitutional error. *See Gore*, 517 U.S. at 572-74. *Compare Ballard*, slip op. at 6, n.2.

15. Here too, these important issues were raised by appellant both in the trial court and in this Court, but were never addressed by either court in its ruling upholding an unprecedented $50 million award. These significant *Gore* issues also should be presented for the Florida Supreme Court's review in the context of this important case.

WHEREFORE the appellant respectfully moves the Court for an order certifying that the three above-specified questions are of great public importance and should be passed upon by the Florida Supreme Court.

* * *